No. 01-7574-CSY Title: David Allen Sattazahn, Petitioner
v.
CAPITAL CASE Pennsylvania

Docketed: Court: Supreme Court of Pennsylvania,
January 8, 2002 Eastern District

Entry	Date	Proceedings and Orders
	Oct 1 2001	Application (01A300) to extend the time to file a petition for a writ of certiorari from October 18, 2001 to December 17, 2001, submitted to Justice Souter.
	Oct 1 2001	Application (01A300) granted by Justice Souter extending the time to file until December 17, 2001.
	Jan 8 2002	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due February 7, 2002)
	Feb 5 2002	Brief of respondent Pennsylvania in opposition filed.
	Feb 21 2002	DISTRIBUTED for Conference of March 15, 2002
	Mar 18 2002	Petition GRANTED. SET FOR ARGUMENT November 4, 2002. **********
	Apr 23 2002	Order extending time to file the joint appendix and petitioner's brief on the merits to and including June 3, 2002.
	Jun 3 2002	Joint appendix filed.
	Jun 3 2002	Brief of petitioner David Allen Sattazahn filed.
	Jun 13 2002	Order extending time to file respondent's brief on the merits to and including August 2, 2002.
	Aug 2 2002	Brief amicus curiae of United States filed.
	Aug 2 2002	Brief of respondent Pennsylvania filed.
	Aug 7 2002	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Aug 31 2002	CIRCULATED.
	Sep 5 2002	Reply brief of petitioner David Allen Sattazahn filed.
	Sep 17 2002	Motion of the Solicitor General to present oral argument pro hac vice filed.
	Sep 20 2002	Record filed.
	Oct 7 2002	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Oct 7 2002	Motion of the Solicitor General to present oral argument pro hac vice GRANTED.
	Nov 4 2002	ARGUED.

ORIGINAL

OCTOBER TERM, 2002

IN THE SUPREME COURT OF THE UNITED STATES
CASE NO. 01A300

DAVID ALLEN SATTAZAHN,

Petitioner,

v.

01 7574

COMMONWEALTH OF PENNSYLVANIA,

Respondent

DEC 17 2001
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PETITIONER'S MOTION AND AFFIRMATION FOR IN FORMA PAUPERIS RELIEF AND FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner DAVID ALLEN SATTAZAHN, through counsel, respectfully moves for in forma pauperis relief and for leave to proceed in forma pauperis and in support of this application submits as follows:

1. This case is before the Court on a petition for writ of certiorari.

2. Petitioner is indigent. He was found to be indigent and in forma pauperis relief was granted by the state courts. He has been represented in all stages of the state court proceedings by court-appointed counsel.

3. Undersigned counsel represents Petitioner pro bono.

4. Petitioner is incarcerated and is without funds to secure the services necessary to proceed in this Court (e.g. printing fees, etc.) or to pay any fees.

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46 pp

5. Attached is an Affidavit or Declaration In Support of a Motion for Leave to File *In Forma Pauperis* by Petitioner in support of this motion.

6. Undersigned counsel affirms that all statements related above are true and correct.

WHEREFORE, Petitioner requests that the Court allow him to proceed *in forma pauperis*.

Respectfully submitted,

ROBERT BRETT DUNHAM
Defender Association of Philadelphia
Federal Court Division, Capital Habeas Unit
The Curtis Center, Suite 545 West
Independence Square West
Philadelphia, PA 19106

COUNSEL FOR PETITIONER

Dated: December 17, 2001

AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, David A. Sottazahn, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	Average monthly amount during the past 12 months		Amount expected next month	
	You	Spouse	You	Spouse
Employment	$ 0	$ 0	$ 0	$ 0
Self-employment	$ 0	$ 0	$ 0	$ 0
Income from real property (such as rental income)	$ 0	$ 0	$ 0	$ 0
Interest and dividends	$ 0	$ 0	$ 0	$ 0
Gifts	$ 0	$ 0	$ 0	$ 0
Alimony	$ 0	$ 0	$ 0	$ 0
Child Support	$ 0	$ 0	$ 0	$ 0
Retirement (such as social security, pensions, annuities, insurance)	$ 0	$ 0	$ 0	$ 0
Disability (such as social security, insurance payments)	$ 0	$ 0	$ 0	$ 0
Unemployment payments	$ 0	$ 0	$ 0	$ 0
Public-assistance (such as welfare)	$ 0	$ 0	$ 0	$ 0
Other (specify):_____	$ 0	$ 0	$ 0	$ 0
Total monthly income:	$ 700	$ 0	$ 0	$ 0

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
			$
			$
			$

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
			$
			$
			$

4. How much cash do you and your spouse have? $ 0

Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
		$	$
		$	$
		$	$

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

☐ Home
Value 0

☐ Other real estate
Value 0

☐ Motor Vehicle #1
Year, make & model 0
Value

☐ Motor Vehicle #2
Year, make & model 0
Value

☐ Other assets
Description 0
Value 0

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
	$	$
	$	$
	$	$

7. State the persons who rely on you or your spouse for support.

Name	Relationship	Age

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home) Are real estate taxes included? ☐ yes ☒ no Is property insurance included? ☐ yes ☒ no	$ 0	$ 0
Utilities (electricity, heating fuel, water, sewer, and telephone)	$	$
Home maintenance (repairs and upkeep)	$	$
Food	$	$
Clothing	$	$
Laundry and dry-cleaning	$	$
Medical and dental expenses	$	$

Transportation (not including motor vehicle payments)	$ 0	$ 0
Recreation, entertainment, newspapers, magazines, etc.	$ 0	$ 0

Insurance (not deducted from wages or included in mortgage payments)

Homeowner's or renter's	$	$
Life	$	$
Health	$	$
Motor Vehicle	$	$
Other:_____	$	$

Taxes (not deducted from wages or included in mortgage payments) (specify):_____	$ 0	$ 0

Installment payments

Motor Vehicle	$	$
Credit card(s)	$	$
Department store(s)	$	$
Other:_____	$	$
Alimony, maintenance, and support paid to others	$	$
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$	$
Other (specify):_____	$	$
Total monthly expenses:	$_____	$_____

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ yes ☒ no If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? ☐ yes ☒ no

If yes, how much? _____

If yes, state the attorney's name, address, and telephone number:

11. Have you paid – or will you be paying – anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ yes ☒ no

If yes, how much? _____

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case.

Defendent has been incarcerated since June 23rd (1989

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: December 12th, 19 2001

David A Cottingham

(Signature)

CASE NO. 01A300

IN THE SUPREME COURT OF THE UNITED STATES

DAVID ALLEN SATTAZAHN,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE PENNSYLVANIA SUPREME COURT

THIS IS A CAPITAL CASE

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Dated: December 17, 2001

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*counsel of record, member of the bar of this Court

Dated: December 17, 2001

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– THIS IS A CAPITAL CASE –

QUESTIONS PRESENTED

1. Does the Double Jeopardy Clause of the Fifth Amendment bar imposition of the death penalty upon reconviction after an initial conviction, set aside on appeal, in which the trial court imposed a statutorily mandated life sentence when the capital sentencing jury failed to reach a unanimous verdict?

2. Is a capital defendant's life and liberty interest in the imposition of a life sentence by operation of state law, following a capital sentencing hearing in which the sentencing jury fails to reach a unanimous verdict, violated when his first conviction is later overturned and the state seeks and obtains a death sentence on retrial?

CASE NO. 01A300

IN THE SUPREME COURT OF THE UNITED STATES

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Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE PENNSYLVANIA SUPREME COURT

Petitioner, David Allen Sattazahn, respectfully prays that the Court issue its Writ of Certiorari to review the decision of the Supreme Court of Pennsylvania, rendered on August 22, 2000, which affirmed Mr. Spotz's conviction and sentence of death.

OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania was filed on November 27, 2000, and is reported at Commonwealth v. Sattazahn, 563 Pa. 533, 763 A.2d 359 (2000). The opinion is attached hereto as Appendix A.

JURISDICTION

The decision of the Pennsylvania Supreme Court was rendered on November 27, 2000. Petitioner timely filed an application for reargument, which was denied on July 20, 2001. Commonwealth v. Sattazahn, 2001 WL 826060 (Pa. July 20, 2001) (attached as Appendix B).) On October 1, 2001, Justice Souter granted Petitioner an extension until December 17, 2001 to

timely file a petition for a writ of certiorari. See Appendix C. This petition is timely filed. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, which provides in relevant part:

> nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb;

and Section 1 of the Fourteenth Amendment to the United States Constitution, which provides in relevant part:

> nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .

It also involves a constitutional life and liberty interest arising out of 42 Pa. C.S. §§ 9711(c)(iv) & (v), which provide in pertinent part:

> (iv) the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance specified in subsection (d) and no mitigating circumstance or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances. The verdict must be a sentence of life imprisonment in all other cases.
>
> (v) the court may, in its discretion, discharge the jury if it is of the opinion that further deliberation will not result in a unanimous agreement as to the sentence, in which case the court shall sentence the defendant to life imprisonment.

STATEMENT OF THE CASE

A. Relevant Procedural History

On May 9, 1991, in a capital murder trial, David Allen Sattazahn was found guilty of first, second, and third degree murder, and related charges in a jury trial in the Berks County

Court of Common Pleas, Commonwealth v. Sattazahn, No. 2194/89. The case proceeded to a capital sentencing hearing, at which the Commonwealth and the defense presented evidence and argument. The hearing was tried to completion, and the trial court instructed the jury on its sentencing options and obligations.

The court instructed the jury that it must return a death sentence if it unanimously determined that the aggravating circumstances proven by the Commonwealth beyond a reasonable doubt outweighed the mitigating circumstances proven by a preponderance of the evidence by the defense, and that it must return a sentence of life imprisonment in all other circumstances. The trial court further instructed the jury that the court was required as a matter of law to impose a sentence of life imprisonment if the jury could not reach a unanimous verdict of either life or death. The sentencing jury did not unanimously agree as to the appropriate sentence. Consequently, the trial court discharged the jury and sentenced Mr. Sattazahn to life imprisonment, as is statutorily mandated under 42 Pa. C.S. § 9711(c)(1)(v).

The Commonwealth could not appeal this adjudication of sentence, and Mr. Sattazahn did not appeal any issue relating to this legal determination of life over death.

On March 12, 1992, Mr. Sattazahn appealed to the Pennsylvania Superior Court, challenging his convictions. Commonwealth v. Sattazahn, No. 01024 PHILA (Pa. Super.). On July 30, 1993, the Superior Court reversed his convictions. Commonwealth v. Sattazahn, 428 Pa. Super. 413, 631 A.2d 597 (1993), *rearg. denied* Oct. 6, 1993. The Commonwealth filed for allowance of appeal, and Mr. Sattazahn sought allowance of cross-appeal on other guilt-stage issues. Commonwealth v. Sattazahn, No. 0544 M.D. 1993 (Pa.). On April 15, 1994, the Supreme Court of Pennsylvania denied Mr. Sattazahn's motion and initially granted the

Commonwealth allowance of appeal. Commonwealth v. Sattazahn, 537 Pa. 639, 644 A.2d 162 (1994). However, on December 30, 1994, the Court dismissed the appeal as having been improvidently granted. Commonwealth v. Sattazahn, 539 Pa. 270, 652 A.2d 293 (1994). The case was remanded to the Court of Common Pleas for a new trial.

On March 9, 1995, despite the statutorily mandated rejection of the death sentence and imposition of a life sentence after the 1991 capital sentencing hearing, the Commonwealth filed notice of intent to seek the death penalty on retrial. Four days later, Mr. Sattazahn filed a motion to prevent the Commonwealth from capitally retrying him. The Court of Common Pleas, per Judge Keller, held that neither the Constitutions of the Commonwealth of Pennsylvania or of the United States, nor Pennsylvania law, prevented Mr. Sattazahn "from choosing between his right to appeal a life sentence mandated by 42 Pa. C.S.A. §9711(c)(2) *and the remote risk of a death sentence upon retrial*." Opinion of the Trial Court, at 1 (July 19, 1995). Mr. Sattazahn appealed this order to the Superior Court, No. 02274 PHILA 1995. On April 18, 1996, a split panel of the Court affirmed. Slip op. (Apr. 18, 1996) (with Brosky, J., dissenting), *rearg. denied*, June 21, 1996. The Supreme Court of Pennsylvania denied Mr. Sattazahn's petition for allowance of appeal from the Superior Court's decision. Commonwealth v. Sattazahn, 547 Pa. 742, 690 A.2d 1162 (1997) (No. 469 M.D. 1996).

In October of 1998, Mr. Sattazahn's counsel of seven years, John Elder, was permitted to withdraw from the case, and John T. Adams was appointed as his new counsel. Mr. Adams reasserted and preserved Petitioner's objections to capital retrial in an *in camera* pretrial proceeding on December 29, 1998. N.T. *In Camera* Pretrial Hearing, 12/29/98, at 3-4. The trial court again rejected Mr. Sattazahn's objections to a capital retrial, and permitted the

Commonwealth to capitally retry Petitioner before a death-qualified jury.

The retrial was conducted between January 12 and January 22, 1999. On January 22, the death-qualified jury found Mr. Sattazahn guilty of first degree murder and related charges. Later that same day, the court conducted a brief sentencing-stage hearing at which "the remote risk of a death sentence upon retrial" became a reality: Mr. Sattazahn was sentenced to death. The trial court formally imposed sentence on February 16, 1999, and Mr. Sattazahn filed a notice of appeal on February 25, 1999.

Mr. Sattazahn challenged his conviction and sentence on a number of grounds, including those asserted herein. The Pennsylvania Association of Criminal Defense Lawyers filed an amicus brief in support of several of Petitioner's arguments, including that the successive death-after-life reprosecution to which the Commonwealth had subjected Mr. Sattazahn violated the double jeopardy clause of the Fifth Amendment as well as Mr. Sattazahn's life and liberty interest in the final adjudication of life without parole that had been rendered in the sentencing hearing in his first trial. On November 27, 2000, the Pennsylvania Supreme Court upheld Petitioner's conviction and death sentence by a bare 4-3 majority, Commonwealth v. Sattazahn, 563 Pa. 533, 763 A.2d 359 (2000).[1] The Court relied upon its 1993 per curiam decision in Commonwealth v. Martorano, 535 Pa. 178, 634 A.2d 1063 (1993), to reject Petitioner's double jeopardy claim. Sattazahn, 563 Pa. at 545-49, 763 A.2d at 366-68. The Court also relied upon Martorano to summarily reject Petitioner's due process claim. Id. at 549, 763 A.2d at 368. Although the Court professed that the due process claim had been raised as a state law issue, it

[1] Three Justices dissented on the grounds that the capital retrial unconstitutionally burdened Petitioner's state constitutional right to appeal.

opined that "Pennsylvania's constitutional analysis of these issues is the same as the federal approach." Id.

Petitioner timely sought reargument based upon the state court's failure to take into consideration this Court's post-Martorano double jeopardy decisions, and because the state court had failed to address his due process claim. With two Justices dissenting, the Pennsylvania Supreme Court denied Petitioner's application for reargument on July 20, 2001. Commonwealth v. Sattazahn, 2001 WL 826060 (Pa. July 20, 2001) (per curiam).

The Pennsylvania Supreme Court also normally would have independently reviewed the arbitrariness and disproportionality of the death-after-life verdict imposed in this case. See 42 Pa. C.S. § 9711(h)(3)(i) (mandatory review of the entire record for "passion, prejudice or any other arbitrary factor"); 42 Pa. C.S. § 9711(h)(3)(iii) (court must reverse if "the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the circumstances of the crime and the character and record of the defendant"). However, the Pennsylvania Supreme Court failed to conduct this review in this case. The state court's opinion contains no mention of any review for passion, prejudice, or arbitrary factor and the state legislature repealed comparative proportionality review in the interim period between Mr. Sattazahn's life sentence and his subsequent capital retrial.[2]

[2] Had such a review been conducted, the outcome is obvious. See Ward v. State, 239 Ga. 205, 208, 236 S.E.2d 365, 369 (1977) ("To affirm the death penalty we must find that the death penalty is not disproportionate to the penalty imposed in similar cases. That is impossible here because we have an identical case involving the same defendant in which the death penalty was not imposed. The same defendant was tried previously on the same charges and the jury imposed a life sentence. Therefore the death sentence in the case under review is obviously disproportionate to the life sentence previously imposed against the same defendant in the same case. Accordingly, the law requires us to vacate the death sentence and direct the imposition of a life sentence.").

B. How the Federal Constitutional Question Was Preserved

The constitutional issues presented herein were preserved when Mr. Sattazahn raised them: (1) in his pre-trial appeal to the Pennsylvania Superior Court and subsequent petition for allowance of appeal seeking discretionary review by the Pennsylvania Supreme Court; and (2) in his direct appeal to the Pennsylvania Supreme Court following imposition of his death-after-life sentence. The questions were addressed either explicitly by the Superior Court of Pennsylvania pre-trial opinion to which the Supreme Court of Pennsylvania denied allocatur or in the Supreme Court of Pennsylvania's opinion affirming Mr. Sattazahn's death sentence on direct review.[3]

REASONS FOR GRANTING THE WRIT

I. Summary of Argument

David Sattazahn was tried and convicted of first degree murder. After his conviction, his case proceeded -- per Pennsylvania law -- to a second evidentiary proceeding. The jury was unable to reach a unanimous verdict, and he was sentenced to life imprisonment as a matter of law. Because this jury deadlock actually resulted in the imposition of a sentence, the case fundamentally differs from those in which a jury deadlocks on the question of guilt of criminal charges. In the former, the trial proceedings are finally determined; in the latter, the "hung jury" prematurely terminates the trial proceedings without any final resolution. As a result of this factual and legal distinction, long-established principles of double jeopardy, due process, and

[3] A federal question is presented for review by this Court when that question was presented to and/or addressed by the state's highest court. E.g., Mills v. Maryland, 486 U.S. 367, 371 (1988) ("in view of the Maryland court's review on the merits, our jurisdiction over the federal constitutional question is established"); Beck v. Alabama, 447 U.S. 625, 630-31 n.6 (1980) (jurisdiction established where capital defendant had "present[ed] his claim in some fashion to the [state] Supreme Court"); Ford v. Georgia, 498 U.S. 411 (1991) (equal protection claim presented, although issue raised and decided in state court as sixth amendment error).

fundamental fairness apply to the retrial of a life-sentenced defendant that are inapplicable in the context of a "hung jury" mistrial. When Pennsylvania capitally retried Petitioner and sought and obtained a sentence of death, that death-after-life sentence violated the Fifth and Fourteenth Amendments.

A State violates the Double Jeopardy Clause of the Fifth Amendment when it subjects a defendant who received a life sentence in his original capital sentencing trial to a capital retrial and death sentence after reversal of his original conviction. Bullington v. Missouri, 451 U.S. 430 (1981). Here, the State presented evidence sufficient to convince some -- but not other -- jurors that death was the appropriate sentence. Because of the Commonwealth's failure of proof, the trial court imposed a life sentence as a matter of law. 42 Pa. C.S. § 9711(c)(1)(v). Trial court rulings that the prosecution has failed, as a matter of law, to establish a defendant's guilt constitute acquittals for double jeopardy purposes. Smalis v. Pennsylvania, 476 U.S. 140 (1986). David Sattazahn was sentenced to death after obtaining a life sentence when initially placed in jeopardy. Subjecting him to a successive capital prosecutions, including twice facing the hazards of a capital sentencing hearing, violated double jeopardy.

David Sattazahn is one of four defendants in less than a decade to have won statutory acquittals of death under 42 Pa. C.S. § 9711(c)(1)(v) and overturned constitutionally infirm convictions only to face second jeopardy of death on retrial. This rising tide of death-after-life trials demonstrates that Pennsylvania has disregarded this Court's messages in Smalis and Bullington on this important and recurring question of federal constitutional law. This Court should grant certiorari, vacate Petitioner's death sentence, and remand to the Pennsylvania Supreme Court to comply with Smalis and Bullington, or alternatively grant the writ to

affirmatively declare that a life sentence imposed by operation of law following a capital sentencing hearing that has been tried to completion implicates double jeopardy.

Similarly, when a state mandates certain capital sentencing procedures or establishes the right to particular appellate, post-conviction, or post-sentencing review in capital cases, it creates Fourteenth Amendment life and liberty interests in those procedures. Here, Pennsylvania enacted a capital sentencing scheme that provided three possible verdicts: a unanimous verdict of death; a unanimous verdict of life; and a sentence of life by operation of law as a result of the jury's inability to reach a unanimous verdict. Pennsylvania was not constitutionally required to select this particular capital sentencing scheme, but having done so, due process ensures that Pennsylvania may not arbitrarily deny David Sattazahn the life sentence that resulted from this process. Pennsylvania cannot deny David Sattazahn the life sentence it was required by law to impose as a product of his initial capital sentencing trial, without violating his life and liberty interest in the capital sentencing process mandated by state law. Nor, once the first sentencing proceeding rendered him death ineligible, could it try him before a death-qualified jury from which qualified, impartial jurors had been improperly excused for cause.

This Court should grant certiorari to review this important and increasingly occurring question of federal constitutional law on which this Court has not expressly spoken. In so doing, this Court should reverse David Sattazahn's death sentence, and grant him the non-capital retrial to which his acquittal of death and the vacation of his unconstitutional first conviction entitle him.

II. The Capital Retrial of David Sattazahn after His First Capital Sentencing Proceeding Resulted in the Imposition of a Life Sentence by Operation of Law Violated His Federal Constitutional Right to Be Free from Double Jeopardy.

David Sattazahn elected to be tried by jury in his original trial in 1991. After he was convicted of first degree murder, the case proceeded -- per Pennsylvania law -- to a second evidentiary proceeding. In that proceeding, the Commonwealth introduced evidence of a single aggravating circumstance,[4] and Mr. Sattazahn presented mitigating evidence of his lack of any significant history of prior criminal convictions and his age at the time of the crime. Commonwealth v. Sattazahn, 563 Pa. 533, 539, 763 A.2d 359, 362 (2000). The Commonwealth was required to prove its aggravating circumstance beyond a reasonable doubt. Mr. Sattazahn was required to prove mitigation by a preponderance of the evidence. 42 Pa. C.S. § 9711(c)(iii).

Following the presentation of evidence and argument by both sides, the trial court instructed the jury that it must return a death sentence if it unanimously found one or more aggravating circumstances and no mitigating circumstances, or aggravating circumstance(s) that outweighed the mitigating circumstances proven by the defense. The jury was further instructed that, in all other circumstances, it must return a sentence of life imprisonment. The trial court also told the jury that the court would impose a sentence of life imprisonment if the jury could not reach a unanimous verdict of either life or death. The sentencing jury was not unanimous as to the appropriate sentence. Consequently, as the jury had been instructed, the trial court sentenced Mr. Sattazahn to life imprisonment as a matter of law, as mandated under 42 Pa. C.S. § 9711(c)(1)(v).

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[4] That circumstance was that the defendant had committed the killing during the perpetration of a felony (robbery). 42 Pa. C.S. § 9711(d)(6).

Mr. Sattazahn successfully appealed his conviction. However, on retrial, the Court of Common Pleas -- and the Superior Court on interlocutory appeal -- permitted the prosecution to again try him capitally pursuant to the Pennsylvania Supreme Court's per curiam decision in Commonwealth v. Martorano, 535 Pa. 178, 634 A.2d 1063 (1993), which held that a directed verdict of life imposed by the trial court after the sentencing jury could not reach a unanimous verdict did not constitute an acquittal of death and so did not implicate double jeopardy.[5] The Commonwealth marshaled new evidence in aggravation in the second trial,[6] and, with this new evidence, Mr. Sattazahn was sentenced to death.

On direct appeal, the Pennsylvania Supreme Court, in a 4-3 decision, wrote:

> Sattazahn argues that *Martorano* was wrongly decided because it is irrelevant whether the life sentence is a result of a unanimous jury verdict or operation of law following jury deadlock because either situation is an acquittal on the merits. This is the exact issue raised by the Appellant in *Martorano* and after a thorough discussion of *North Carolina v. Pearce*, 395 U.S. 711 (1969); *Bullington v. Missouri*, 451 U.S. 430 (1981); *Arizona v. Rumsey*, 467 U.S. 203 (1984) and *Poland v. Arizona*, 476 U.S. 147 (1986) we rejected it.

Sattazahn, 563 Pa. at 547, 763 A.2d at 367.

The state court, tracking its analysis of double jeopardy in Martorano, narrowly interpreted this Court's double jeopardy rulings as applying only where there has been a prior

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[5] Ironically, the death-after-life aspect of the Martorano per curiam decision – which was never briefed by the parties – turned out to be irrelevant to the disposition of that case. The state courts ultimately barred any reprosecution of the two defendants – let alone capital reprosecution – and freed them on *state* double jeopardy grounds because of extensive intentional misconduct by the prosecution in the first trial. Commonwealth v. Daidone, 453 Pa. Super. 550, 684 A.2d 179 (1997), *aff'd sub nom.*, Commonwealth v. Martorano, 559 Pa. 533, 741 A.2d 1221 (1999).

[6] The additional aggravating circumstance -- that Mr. Sattazahn had "a significant history of felony convictions involving the use or threat of violence to the person" -- was based upon convictions obtained *after* the first capital trial for crimes committed *after* the date of the homicide in this case.

factfinding by the ultimate sentencer that resulted in an "implied acquittal" of death. It wrote:

> In *Martorano,* we applied *Bullington* and *Rumsey* and held that the Commonwealth is not precluded from seeking the death penalty on retrial, where, following their first trial, defendants were convicted of first-degree murder and sentenced to life imprisonment, not by a unanimous jury verdict, but by the trial judge following the jury's deadlock regarding the penalty. The hung jury did not act as an acquittal on the merits as did the proceedings at issue in *Bullington* and *Rumsey.*

Sattazahn, 563 Pa. at 547, 763 A.2d at 367. The state court attempted to distinguish Bullington v. Missouri, 451 U.S. 430 (1981), on the grounds that the unanimous jury verdict in that case "impliedly decided that the prosecution had not proved its case for death," whereas the non-unanimous "hung jury" in this case did not itself reach a verdict. Id. at 546, 763 A.2d at 366. It then attempted to distinguish Arizona v. Rumsey, 467 U.S. 203 (1984), on the grounds that the court in Rumsey had imposed a life sentence only after itself making predicate findings of fact that the prosecution had failed to prove its case for death, whereas here – the court maintained – "the imposition of a life sentence by the trial judge [did not] operate as an acquittal." Id. at 548, 763 A.2d at 367.

The state court anchored its no-acquittal reasoning on the fact that "[u]nder Pennsylvania's sentencing scheme, the judge has no discretion to fashion sentence once he finds that the jury is deadlocked. The statute directs him to enter a life sentence." Id. (citing 42 Pa. C.S. § 9711(c)(1)(v)). Therefore, the court opined, "the judge makes no findings and resolves no factual matter. Since judgment is not based on findings which resolve some factual matter, it is not sufficient to establish legal entitlement to a life sentence. A default judgment does not trigger a double jeopardy bar to the death penalty upon retrial." Id.

As discussed below, the state court decided this important issue of federal constitutional

law in a manner that conflicts with numerous relevant decisions of this Court – including at least one decision that overturned the Pennsylvania Supreme Court for a similar misinterpretation of what constitutes a judicial acquittal for purposes of the Double Jeopardy Clause.[7]

A State violates the Double Jeopardy Clause of the Fifth Amendment when it subjects a defendant who received a life sentence in his original capital sentencing trial to a capital retrial and death sentence after reversal of his original conviction. Bullington v. Missouri, 451 U.S. 430 (1981) (double jeopardy where jury had sentenced capital defendant to life imprisonment after trial-like capital sentencing proceeding); Arizona v. Rumsey, 467 U.S. 203 (1984) (double jeopardy where, after trial-like capital sentencing proceeding, trial judge sentenced capital defendant to life based upon erroneous view that the evidence did not support any aggravating circumstances). This is because when a capital defendant receives a life sentence after a "capital sentencing proceeding [that] 'was itself a trial on the issue of punishment,' requiring [him] to submit to a second, identical proceeding [is] tantamount to permitting a second prosecution of an acquitted defendant." Schiro v. Farley, 510 U.S. 1215 (1994) (quoting and citing Bullington).[8]

Pennsylvania violated David Sattazahn's double jeopardy rights when it capitally retried

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[7] See Smalis v. Pennsylvania, 476 U.S. 140 (1986) (reversing decision of the Pennsylvania Supreme Court that a demurrer granted by the trial court as a matter of law at the close of the prosecution's case-in-chief did not constitute a factual determination of guilt or innocence and hence was not the functional equivalent of an acquittal).

[8] See also Sanne v. State, 609 S.W.2d 762, 766-67 (Tex. 1980) (under federal double jeopardy clause, defendant originally sentenced to life imprisonment may not be sentenced to death upon retrial); Brasfield v. State, 600 S.W.2d 288, 298 (Tex. 1980) (same); cf. Poland v. Arizona, 476 U.S. 147 (1986) (no double jeopardy where trial judge sentenced capital defendant to death based upon finding of a single aggravating circumstance that was not supported by the evidence when death sentence could have been supported by another aggravating circumstance that the trial court erroneously believed was not present; double jeopardy would have attached if court's error had resulted in a life sentence).

him and sentenced him to death after he had been subjected to a trial-trial capital sentencing proceeding in his initial trial and been sentenced to life imprisonment. For double jeopardy purposes, it is of no moment that his sentencing trial concluded with a statutorily mandated directed verdict of life imprisonment after the jury had failed to reach a unanimous verdict, as opposed to by a verdict by a unanimous jury or by a judge who was assigned the task of finding and weighing aggravating and mitigating circumstances.

This Court's precedents make clear that double jeopardy attaches whenever a capital defendant is subjected to trial-like capital sentencing proceedings, tried to completion, and the sentencing proceedings terminate with the imposition of a sentence other than death. Bullington, Rumsey, *supra*.

The Pennsylvania Supreme Court's holdings in Sattazahn and Martorano that double jeopardy does not protect a capital defendant who has been sentenced to life after a jury sentencing proceeding unless the defendant's life sentence was the product of a unanimous jury verdict are untenable. Its view is that double jeopardy cannot attach when a life sentence is not imposed "by a unanimous jury verdict, but by the trial judge following the jury's deadlock on penalty." Martorano, 535 Pa. at 188, 634 A.2d at 1067-68; Sattazahn, 563 Pa. at 547-49, 763 A.2d at 367-68. This cramped interpretation of the Fifth Amendment elevates form over substance and badly misapprehends this Court's decisions on double jeopardy.

Pennsylvania's erroneous double jeopardy decisions fail to acknowledge the surpassing importance of the trial-like nature of the state's capital sentencing proceeding and the outcome that exposure to initial jeopardy produces. Instead, the decisions rest on fundamental misconceptions as to the consequences of a deadlocked capital sentencing jury and as to what

constitutes an actual or implied "acquittal" of a death sentence. Under Pennsylvania's capital sentencing scheme, a non-unanimous capital sentencing jury is not a "hung jury" that prematurely terminates the trial proceedings without any final resolution of the case. The jury is discharged, but this does not produce a mistrial. On the contrary, the legislature specifically envisioned that a capital sentencing trial might produce a divided jury that could not agree on the appropriate sentence. It dealt with that possibility by giving the trial judge discretion to discharge the jury and, upon discharge, requiring the court to impose a life sentence as a matter of law.

This distinction makes a difference. The typical hung jury produces a mistrial that does not determine the outcome of the trial. This is not an acquittal and does not terminate the case. The typical hung jury produces no legal judgment and no jeopardy bar attaches. United States v. Perez, 9 U.S. (Wheat) 579, 580 (1824). However, when a trial court enters a directed verdict for the defendant after discharging a deadlocked jury, that directed verdict constitutes a judgment of acquittal that "act[s] to terminate a trial in which jeopardy has long since attached." United States v. Martin Linen Supply Co., 430 U.S. 564, 570 (1977). Pennsylvania law mandates that, if the jury cannot reach a unanimous verdict after consideration of the evidence on the issue of whether the defendant should live or die, "the court shall sentence the defendant to life imprisonment." 42 Pa. C.S. § 9711(c)(v). It necessarily follows that:

> such a judgment of acquittal plainly concludes a pending prosecution in which jeopardy has attached, following the introduction at trial of evidence on the general issue. In that circumstance we hold that 'although retrial is sometimes permissible after a mistrial is declared but no verdict or judgment has been entered, the verdict of acquittal foreclosed retrial and thus barred appellate review.'

Martin Linen, 430 U.S. at 576 (quoting United States v. Wilson, 420 U.S. 332, 348 (1975)).

The discharge of a non-unanimous capital-sentencing jury in Pennsylvania does not produce a mistrial without final judgment. Quite the opposite. It produces an unappealable directed verdict of life imprisonment that terminates the capital sentencing trial. This judicially imposed life sentence is an acquittal of death that triggers double jeopardy protections.

The Pennsylvania double jeopardy decisions – including the decision in this case – compound their misunderstanding of the consequences of jury deadlock by repeating a twenty-year-old error concerning the implications of judicial acquittals entered as a matter of law. The Pennsylvania Supreme Court clearly believes that a factual acquittal of death is necessary for double jeopardy to attach and that this requires express factfinding in favor of life.[9] As a result, it also believes that the issuance of the statutorily mandated "default judgment" for life following discharge of a non-unanimous jury "is not sufficient to establish legal entitlement to a life sentence" because the judge who imposed the life sentence has "ma[de] no findings and resolve[d] no factual matter." Sattazahn, 563 Pa. at 548, 763 A.2d at 367; Martorano, 535 Pa. at 194, 634 A.2d at 1070.

This position virtually recapitulates the error the court previously made in Smalis v. Pennsylvania, 476 U.S. 140, 142-43 (1986). In Smalis, the Pennsylvania Supreme Court had held that the grant of a demurrer as a matter of law following the prosecution's case-in-chief was

[9] Such a requirement is, of course, absurd. Where the state has the burden of proving guilt, a defendant need not establish factual innocence to be entitled to an acquittal. Where the state has the burden of persuasion on the issue of death, a defendant need only show that the state has failed to carry that burden by failing to persuade. The court's directed verdict of life is simply a declaration that the prosecution has failed to meet the burden of persuasion necessary for it to impose death. Where the burden of persuasion requires a unanimous decision for death, the failure to persuade all jurors to vote for death is an acquittal of death.

not an acquittal warranting double jeopardy protection. It wrote:

> In deciding whether to grant a demurrer, the court does not determine whether or not the defendant is guilty on such evidence, but determines whether the evidence, if credited by the jury, is legally sufficient to warrant the conclusion that the defendant is guilty beyond a reasonable doubt. . . . Hence, by definition, a demurrer is not a factual determination. . . . [T]he question before the trial judge in ruling on a demurrer remains purely one of law. We conclude, therefore, that a demurrer is not the functional equivalent of an acquittal . . . .

Smalis, 476 U.S. at 143 (quoting Commonwealth v. Zoller, 507 Pa. 344, 357-58, 490 A.2d 394, 401 (1985)).[10]

This Court flatly disagreed, noting that "the Pennsylvania Supreme Court's characterization, as a matter of double jeopardy law, of an order granting a demurrer is not binding on us." Smalis, 476 U.S. at 144 n.5. While accepting Pennsylvania's definition of what the trial judge must consider in granting a demurrer, this court held that the resulting ruling, "that as a matter of law the State's evidence is insufficient to establish his factual guilt[,] is an acquittal under the Double Jeopardy Clause." Id. at 144.

Even accepting Pennsylvania's definition of what the trial judge must consider before imposing a life sentence as a matter of law,[11] however, it is clear that double jeopardy attached to

[10] Zoller and Smolis were consolidated on appeal to the Pennsylvania Supreme Court, and this Court granted certiorari in Smolis.

[11] Obviously, the trial court is not required to make any specific factfindings as to the existence of aggravating or mitigating circumstances or their relative weight before imposing a life sentence. That notwithstanding, the Pennsylvania Supreme Court is simply wrong that the trial court has not -- at least implicitly -- rendered an actual factfinding of acquittal. All the defense must do to establish legal entitlement to a life sentence is to prove a simple negative -- the absence of a finding that death has been proven. Under Pennsylvania law, a jury's failure to unanimously agree that death should be imposed amounts to a decision, by operation of law, that death is *not* the appropriate punishment. Pennsylvania law explicitly states that death is an appropriate sentence in only two, and only two, scenarios: (1) when the sentencing jury unanimously agrees both that the state has proven one or more aggravating circumstances and

Petitioner's initial capital sentencing trial. "Under Pennsylvania's sentencing scheme, the judge has no discretion to fashion sentence once he finds that the jury is deadlocked. The statute directs him to enter a life sentence." Sattazahn, 563 Pa. at 548, 763 A.2d at 367. The jury was deadlocked. The judge imposed a directed verdict of life. Smalis presages the double jeopardy consequences of that ruling: the entry of a life sentence is an acquittal of death. Smalis, 476 U.S. at 145 n.8 ("In [Arizona v.] Rumsey, a trial judge sitting as a sentencer entered an 'acquittal,' i.e., a life sentence. . . . The Court held that the Double Jeopardy Clause barred a second sentencing hearing.").

Had Pennsylvania simply followed this Court's guidance in Smalis, there would be no case or controversy here. Unfortunately, it did not. Instead, the decisions of Pennsylvania's supreme court assert that double jeopardy attached in Bullington only because the acquittal of death by the sentencing jury in that case was unanimous. E.g., Martorano, 535 Pa. at 191, 634 A.2d at 1061 (Bullington "held that, where the first jury returns a unanimous verdict of life imprisonment, the Double Jeopardy Clause of the Fifth Amendment bars imposition of the death penalty upon retrial."). They assert that double jeopardy attached in Rumsey because of the

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that the defendant has proven no mitigating circumstances; and (2) when the sentencing jury unanimously agrees that the aggravating circumstance(s) that all jurors have found to exist outweigh the combination of mitigating circumstances that any of the jurors have found to exist. When this does not occur, either because the weighing process has produced a contrary outcome or because the jurors have not unanimously agreed on an outcome, the defendant is legally entitled to a life sentence, which the court is statutorily required to impose. All the trial needs to find is that the jury is deadlocked. The consequences of that deadlock – that the Commonwealth has failed to muster evidence sufficient to convince the jury to impose death -- mandates "enter[ing] an 'acquittal,' i.e., a life sentence." Smalis, 476 U.S. at 145 n.8

nature of the trial court's factfinding, rather than the nature of the trial court's judgment.[12] But this Court has *never* read either case that way. This Court's conception of an "acquittal" of death is the imposition of a life sentence after a trial-like proceeding tried to completion.

Bullington hinged on the procedural requirements that made Missouri's capital sentencing proceeding trial-like, 451 U.S. at 433-35, and repeatedly stressed that the binary choice of sentences resulting from those proceedings -- either life or death[13] -- would determine whether the prosecution had proven its case for death, id. at 444-45. Moreover, the Court expressly included among its description of the "substantive standards" and "procedural protections" that qualified Missouri life sentences for double jeopardy protection that "[i]f the jury is unable to agree, the defendant receives the alternative sentence of life imprisonment." Id. at 435. If juror unanimity had been a prerequisite to double jeopardy, this Court would not have mentioned the life sentence resulting from a non-unanimous jury, would have specifically

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[12] The Pennsylvania Supreme Court badly misreads Rumsey as requiring a specific factfinding of aggravating and mitigating circumstances that could legally support no sentence other than life before the resulting judgment could amount to an acquittal on the merits. But this Court said no such thing. It said, "as required by state law, the court then *entered judgment in respondent's favor* on the issue of death. That judgment . . . amounts to an acquittal on the merits and, as such, bars any retrial of the appropriateness of the death penalty." Justice O'Connor indicated in a subordinate clause that the judgment in that particular case had been "based on findings sufficient to establish legal entitlement to the life sentence," but did not say -- as Pennsylvania erroneously contends -- that the judgment could not amount to an acquittal on the merits *unless* it was based on findings sufficient to establish legal entitlement to the life sentence. This Court has consistently held that any judgment in the defendant's favor -- even one that is based on erroneous factfinding that would be insufficient to establish legal entitlement to a life sentence or guilt-stage acquittal -- implicates double jeopardy and bars retrial.

[13] Id. at 432 ("Missouri law provides two, and only two, possible sentences for a defendant convicted of capital murder: (a) death, or (b) life imprisonment without eligibility for probation or parole for 50 years."); id. at 440 ("Bullington's Missouri jury was given -- and under the State's statutes could be given -- only two choices, death or life imprisonment.").

disclaimed double jeopardy protections for those sentences, or would have reserved that question.

Thus, as this Court explained in Rumsey, "the Double Jeopardy Clause applies to Missouri's *capital sentencing proceeding*" -- not just to a unanimous jury verdict -- and bars imposition of the death penalty on retrial whenever "an initial conviction, set aside on appeal, *has resulted in rejection of the death sentence*." Rumsey, 467 U.S. at 209. It similarly applies to Arizona's capital sentencing proceeding, id. at 209-10; Poland v. Arizona, 476 U.S. 147, 154 n.4 (1986), and -- as discussed below -- to Pennsylvania's.

The characteristics of Pennsylvania's "capital sentencing proceeding [are] indistinguishable for double jeopardy purposes from the capital sentencing proceeding[s] in Missouri" and Arizona. Rumsey, 467 U.S. at 209.

- The sentencer is required to choose between two options: in Arizona, death or life without possibility of parole for 25 years; in Missouri, life without possibility of release for 50 years; in Pennsylvania, life without possibility of parole.
- The sentencer must make this decision guided by detailed statutory standards defining aggravating and mitigating circumstances, based on evidence introduced in a separate proceeding that formally resembles a trial.
- The sentencing statute requires proof of aggravating circumstances beyond a reasonable doubt, pursuant to procedures governing the admissibility of evidence.
- The statute identifies those circumstances in which a death sentence may be imposed and when a life sentence may be imposed.

Rumsey, 467 U.S. at 209-10; Bullington, 451 U.S. at 432-35; 42 Pa. C.S. § 9711; 42 Pa. C.S. § 9756(c); 61 Pa. C.S. § 331.21. "For these reasons, when the Missouri" or Arizona, or Pennsylvania "sentencer imposes a sentence of life imprisonment in a capital sentencing proceeding, it has determined that the prosecution has failed to prove its case." Rumsey, 467

U.S. at 209. Because "the anxiety and ordeal suffered by a defendant in Missouri's" and Arizona's and Pennsylvania's "capital sentencing proceeding are the equal of those suffered in a trial on the issue of guilt, . . . the Double Jeopardy Clause prohibits the State from resentencing the defendant to death after the sentencer has in effect acquitted the defendant of that penalty." Id.

The Pennsylvania sentencing jury's discretion is even more circumscribed than is that of a Missouri sentencing jury: the Missouri jury "is instructed that it is not compelled to impose the death penalty, even if it decides that a sufficient aggravating circumstance or circumstances exist and that it or they are not outweighed by any mitigating circumstance or circumstances," Bullington, 451 U.S. at 434-35; while the Pennsylvania capital sentencer is instructed that it *must* impose a death sentence whenever it unanimously finds the existence of one or more aggravating circumstances that outweigh the mitigating circumstances present in the case, 42 Pa. C.S. § 9711(c)(1). However, like Missouri, any jury decision to impose the death penalty must be unanimous; and if the jury cannot agree on a sentence, the defendant is sentenced to life imprisonment by operation of law. Bullington, 451 U.S. at 434-35; 42 Pa. C.S. § 9711(c)(1)(iv)-(v). "That the sentencer in [Pennsylvania when a jury deadlocks] is the trial judge rather than the jury does not render the sentencing proceeding any less like a trial," nor does the fact that "no appeal need be taken if life imprisonment is imposed." Rumsey, 467 U.S. at 210.

> In short, a sentence imposed after a completed [Pennsylvania] capital sentencing hearing is a judgment like the sentence at issue in Bullington v. Missouri, which this Court held triggers the protections of the Double Jeopardy Clause.
>
> The double jeopardy principle relevant to respondent's case is the same as that invoked in Bullington: an acquittal on the merits by the sole decisionmaker in the proceeding is final and bars retrial on the same charge. Application of the

> Bullington principle renders respondent's death sentence a violation of the Double Jeopardy Clause because respondent's initial sentence of life imprisonment was undoubtedly an acquittal on the merits of the central issue in the proceeding -- whether death was the appropriate punishment for respondent's offense. . . . [A]s required by state law, the court then entered judgment in respondent's favor on the issue of death. That judgment, based on findings sufficient to establish legal entitlement to the life sentence, amounts to an acquittal on the merits and, as such, bars any retrial of the appropriateness of the death penalty.

Id. at 210-11; see Green v. United States, 355 U.S. 184, 190-91 (1957) (conviction of defendant for second degree murder was an implied acquittal of accompanying charges of first degree murder, and double jeopardy barred retrial for first degree murder when conviction was reversed on appeal).

Here, David Sattazahn's legal entitlement to the life sentence he received in his first capital sentencing proceeding is beyond question. The state presented evidence that convinced some jurors and not others. It did not present enough good evidence to obtain a death sentence. As a result, the trial court sentenced Mr. Sattazahn to life. The historic policies underlying the Double Jeopardy Clause make clear why double jeopardy attaches under these circumstances:

> The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding. *This is central to the objective of the prohibition against successive trials.* The Clause does not allow "the State . . . to make repeated attempts to convict an individual for an alleged offense," since "[t]he constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense." Green v. United States, 355 U.S. 184, 187 (1957); see Serfass v. United States, 420 U.S. 377, 387-388 (1975); United States v. Jorn, 400 U.S. 470, 479 (1971).

Burks v. United States, 437 U.S. 1, 11 (1978) (footnote and parallel citations omitted).

In Bullington, this Court indicated that double jeopardy entitled the prosecution to "one fair opportunity" to obtain a capital conviction, Bullington, 451 U.S. at 442 (quoting Burks), but

only one opportunity. The Court declared:

> A verdict of acquittal on the issue of guilt or innocence is, of course, absolutely final. The values that underlie this principle . . . are equally applicable when a jury has rejected the State's claim that the defendant deserves to die[. ¶] . . . The "embarrassment, expense and ordeal" and the "anxiety and insecurity" faced by a defendant at the penalty phase of a Missouri capital murder trial surely are at least equivalent to that faced by any defendant at the guilt phase of a criminal trial. The "unacceptably high risk that the [prosecution], with its superior resources, would wear down a defendant," id., at 130, 101 S.Ct., at 433, thereby leading to an erroneously imposed death sentence, would exist if the State were to have a further opportunity to convince a jury to impose the ultimate punishment.

Bullington, 451 U.S. at 445.

This was the law at the time of Pennsylvania's per curiam decision in Martorano. However, if the Pennsylvania courts entertained any doubt as to what Bullington really meant, this Court's decision three months later in Schiro v. Farley, 510 U.S. 222 (1994) should have eliminated it. Under double jeopardy, this Court wrote, "the primary evil to be guarded against is successive prosecutions: '[T]he prohibition against multiple trials is the controlling constitutional principle.'" Id. at 230 (quoting United States v. DiFrancesco, 449 U.S. 117, 132 (1980)). Finding that a "capital sentencing proceeding '[is] itself a trial on the issue of punishment,' requiring a defendant to submit to a second, identical proceeding [is] tantamount to permitting a second prosecution of an acquitted defendant." Id. at 232.

The capital sentencing jury in David Sattazahn's first trial did not unanimously agree that he should be sentenced to death. Under the Pennsylvania capital sentencing statute, this required the imposition of a life sentence as a matter of law. His capital retrial after successfully challenging his unconstitutional conviction "was tantamount to permitting a second prosecution of an acquitted defendant" and was barred by double jeopardy.

> Since we necessarily afford absolute finality to a jury's verdict of acquittal -- no matter how erroneous its decision -- it is difficult to conceive how society has any greater interest in retrying a defendant when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty.

Bullington, 451 U.S. at 442-43 (quoting Burks, 437 U.S. at 16); Poland v. Arizona, 476 U.S. at 153 n.2 (same).

David Sattazahn was sentenced to death after obtaining a life sentence when initially placed in jeopardy. Subjecting him to a successive capital prosecutions, including twice facing the hazards of a capital sentencing hearing, violated double jeopardy. His death sentence must be vacated, and Pennsylvania forever barred from seeking death in his case.

However, this double jeopardy problem is no longer an isolated one. David Sattazahn is one of four defendants in less than a decade to have won statutory acquittals of death under 42 Pa. C.S. § 9711(c)(1)(v) and overturned constitutionally infirm convictions only to face second jeopardy of death on retrial. In addition to Mr. Sattazahn, there have been Albert Daidone, Raymond Martorano, and Orlando Maisonet.[14] This rising tide of death-after-life trials demonstrates that Pennsylvania has disregarded this Court's messages in Smallis and Bullington. This Court should grant certiorari, vacate Petitioner's death sentence, and remand to the Pennsylvania Supreme Court to comply with Smallis and Bullington, or alternatively grant the writ to affirmatively declare that a life sentence imposed by operation of law following a capital sentencing hearing that has been tried to completion implicates double jeopardy.

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[14] Commonwealth v. Maisonet, Nov. Term, 1990, Nos. 3483-3486 (Phila. C.P., Crim. Div.). This case is pending on retrial.

III. The Capital Retrial of David Sattazahn after His First Capital Sentencing Proceeding Resulted in the Imposition of a Life Sentence by Operation of 42 Pa. C.S. § 9711(c)(1)(v) Violated His Due Process Life and Liberty Interest in the Sentence Mandated by Pennsylvania's Death Penalty Statute.

When a state mandates certain capital sentencing procedures or establishes the right to particular appellate, post-conviction, or post-sentencing review in capital cases, it creates Fourteenth Amendment life and liberty interests in those procedures. Evitts v. Lucey, 469 U.S. 387, 393 (1985) (due process interest in state created right to direct appeal); see Hicks v. Oklahoma, 447 U.S. 343, 346 (1980) (liberty interest in state-created capital sentencing procedures); Ford v. Wainwright, 447 U.S. 399, 427-31 (1986) (O'Connor, J., concurring) (liberty interest in state-created right to proceedings to determine competency to be executed); Ohio Adult Parole Authority v. Woodard, 523 U.S. 272, 288-89 (1998) (O'Connor, J, with Souter, Ginsburg & Breyer, JJ., concurring) (life interest in state-created right to capital clemency proceedings); id. at 291-92 (Stevens, J., concurring) (life interest in commutation procedures "abundantly clear"). Although the right to the particular procedure is established by state law, the violation of the life and liberty interest it creates is governed by *federal* constitutional law. Hicks, 447 U.S. at 346; Ford, 477 U.S. at 428-29; see Evitts, 469 U.S. at 393 (state procedures employed "as 'an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant'" must comport with due process).[15]

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[15] See also Fetterly v. Paskett, 997 F.2d at 1300 ("There is, of course, nothing in the Constitution of the United States that requires Idaho's legislature to approach [capital sentencing] as it has done . . . . However, the failure of a state to abide by its own statutory commands may implicate a liberty interest protected by the Fourteenth Amendment against arbitrary deprivation by a state."); Foster v. Delo, 39 F.3d 873, 882 (8th Cir. 1994) ("Where a state creates a right, such as a defendant's right to a review of his sentence, the Fourteenth Amendment of course entitles him to procedures to ensure that the right is not arbitrarily denied.").

The Pennsylvania capital sentencing code unequivocally establishes when a defendant on trial for his life may be sentenced to death and when he must be sentenced to life imprisonment. 42 Pa. C.S. § 9711(c)(1)(iv)-(v). The Pennsylvania Supreme Court has explained:

> Subsection (c)(1)(iv) of our death penalty statute provides that a jury must impose a sentence of death if they unanimously find at least one aggravating circumstance and no mitigating circumstances or unanimously find one or more aggravating circumstances which outweigh any mitigating circumstances, and that in all other cases, the verdict must be a sentence of life imprisonment. 42 Pa.S.C. § 9711(c)(1)(iv).

Commonwealth v. Jones, 546 Pa. 161, 198-99, 683 A.2d 1181, 1199 (1996).

Where the sentencing proceeding is tried to completion, a judgment of sentence must be imposed in accordance with the jury's unanimous verdict, or, in the absence of a verdict, by operation of law under 42 Pa. S.C. § 9711(c)(1)(v). The Pennsylvania Supreme Court has been unequivocal as to the outcome of such a proceeding: "***subsection (c)(1)(v) . . . mandates that a court impose a life sentence where the jury is unable to reach a unanimous agreement***." Jones, 546 Pa. at 199, 683 A.2d at 1199. The Court was equally clear in this case:

> "Under Pennsylvania's sentencing scheme, the judge has no discretion to fashion sentence once he finds that the jury is deadlocked. ***The statute directs him to enter a life sentence***."

Commonwealth v. Sattazahn, 563 Pa. at 548, 763 A.2d at 367 (quoting Commonwealth v. Martorano, 535 Pa. 178, 194, 634 A.2d 1063, 1070 (1993)); id. at 539, 763 A.2d at 362 (explaining that trial court had "entered a *mandatory* life sentence").[16]

[16] See also Jones, 546 Pa. at 198, 683 A.2d at 1199 ("Where the jury is unable to reach a unanimous agreement as to the sentence, the court must impose a sentence of life."); Martorano, 535 Pa. 178, 198, 634 A.2d 1063, 1072 (1993) ("In the absence of a unanimous verdict, subsection (v) provides for the discharge of the jury and imposition of a life sentence by the court.").

Furthermore, Pennsylvania law and trial practice requires that the jury be aware at the time of its sentencing deliberations of the legal consequences of a deadlock as to sentence. The sentencing statute requires the trial court *to instruct the jury* as to the legal consequences of its failure to reach a verdict, 42 PA. C.S. § 9711(c)(1) ("Before the jury retires to consider the sentencing verdict, the court shall instruct the jury on the following matters: . . . (v) the court may, in its discretion, discharge the jury if it is of the opinion that further deliberation will not result in a unanimous agreement as to the sentence, in which case the court shall sentence the defendant to life imprisonment."), and juries are so instructed; e.g. Jones, 546 Pa. at 199, 683 A.2d at 1199 (example of this instruction). The Pennsylvania Rules of Criminal Procedure mandate that the trial court also provide the capital sentencing jury a verdict slip that specifically explains that "THE JUDGE WILL SENTENCE THE DEFENDANT TO LIFE IMPRISONMENT" if the jury cannot reach a unanimous sentencing verdict. PA. R. CRIM. P. 358A (subsequently renumbered as PA. R. CRIM. P. 807).[17] As a result, sentencing juries know from the outset of deliberations that by disagreeing on the applicable sentence, the defendant will receive a life sentence.

Thus, there can be no question that the discharge of a non-unanimous capital sentencing jury under 42 PA. C.S. § 9711(c)(1)(v) actually produces a sentence: it does so *as a matter of law*. The procedures are statutorily delineated; the outcome is mandatory. By establishing

[17] The pertinent section of the verdict slip reads as follows:

> IF, AFTER SUFFICIENT DELIBERATION, YOU CANNOT UNANIMOUSLY REACH A SENTENCING VERDICT, DO NOT COMPLETE OR SIGN THIS SLIP, BUT RETURN IT TO THE JUDGE. THE JUDGE WILL DETERMINE IF FURTHER DELIBERATIONS ARE REQUIRED. IF THEY ARE NOT, THE JUDGE WILL SENTENCE THE DEFENDANT TO LIFE IMPRISONMENT.

sentencing procedures that require the imposition of a life sentence whenever a capital sentencing jury does not unanimously agree to impose death, and requiring the judicial imposition of a life sentence when the jury cannot agree on a sentence, the law of Pennsylvania vested in David Sattazahn a constitutionally protected life and liberty interest in the life sentence that was the product of these proceedings. Hicks, 447 U.S. at 346.[18] Having chosen a particular capital sentencing scheme, Pennsylvania cannot -- without violating due process -- deny a defendant the benefits of the sentence mandated by these procedures. Hicks, 447 U.S. at 346-47; Wolff v. McDonald, 418 U.S. 539, 557 (1974); see also Ohio Adult Parole Authority v. Woodard, 523 U.S. at 292-93 (Stevens, J., concurring) (same re: appellate and post-conviction remedies).

At a minimum, Pennsylvania cannot deny David Sattazahn the statutorily mandated life

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[18] See also Toney v. Gammon, 79 F.3d 693, 699-700 (8th Cir. 1996) (where court had discretion under MO. REV. STAT. § 558.026.1 to sentence sex offender to either consecutive or concurrent sentences for crimes of a sexual nature committed at the same time, the statute created "a constitutionally protected liberty interest in the sentence resulting from the exercise of this discretion, and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State"); Walker v. Deeds, 50 F.3d 670, 673 (9th Cir. 1995) (NEV. REV. STAT. § 207.010, requiring trial court to make particularized findings under habitual offender statute creates liberty interest in that sentencing procedure); Foster v. Delo, 39 F.3d 873, 882 (8th Cir. 1994) (due process interest in state-mandated proportionality review in capital cases); Fetterly v. Paskett, 997 F.2d 1295, 1299-1300 (9th Cir. 1993) (IDAHO CODE § 19-2515(c) created liberty interest in capital sentencing procedures requiring jury to balance mitigating circumstances (collectively) against each aggravating circumstance (individually)); Rust v. Hopkins, 984 F.2d 1486, 1492-93 (8th Cir. 1993) (NEB. REV. STAT. § 29-2523 created liberty interest in consideration of aggravating circumstances based on proof beyond a reasonable doubt, and § 29-2525 creates liberty interest in appellate review based upon statutory standards); Fetterly v. Paskett, 997 F.2d 1295, 1299-1300 (9th Cir. 1993) (due process interest in capital sentencing procedures); Dupuy v. Butler, 837 F.2d 699, 703 (5th Cir. 1988) (due process interest in exercise of discretion between statutorily available sentencing options); Wilkins v. Bowersox, 933 F. Supp. 1496, 1524-26 (W.D. Mo. 1996) (due process interest in state-mandated appellate proportionality review), aff'd, 145 F.3d 1006 (8th Cir. 1998); Harris v. Blodgett, 853 F. Supp. 1239, 1286-90 (W.D. Wash. 1994) (same), aff'd sub. nom., Harris v. Wood, 64 F.3d 1432 (9th Cir. 1995).

sentence that was the product of his initial capital sentencing trial. Subjecting Mr. Sattazahn to a capital resentencing hearing, and the resulting death sentence, when the Commonwealth had no basis or ability to appeal his life sentence, arbitrarily denied Mr. Sattazahn's liberty interest in the sentence mandated by the Pennsylvania death penalty statute.

Moreover, David Sattazahn had a *life* as well as liberty interest in full enforcement of the life sentence imposed at his first trial by operation of Pennsylvania law. This life interest is even stronger than the liberty interest present in non-capital cases, and requires more solicitous treatment by the Courts. As Justice Stevens has explained :

> The interest in life that is at stake in this case warrants even greater protection than the interests in liberty at stake in [non-capital] cases. For "death is a different kind of punishment from any other which may be imposed in this country. From the point of view of the defendant, it is different in both its severity and its finality . . . . From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." Gardner v. Florida, 430 U.S. 349, 357-58, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (1977) (citations omitted) (plurality opinion).

Woodard, 523 U.S. at 293-94.

Society has a heightened interest in ensuring that a capital defendant receives the benefit of the statutorily mandated life sentence he has earned at trial. Had David Sattazahn been afforded a fair trial the first time around, he would not be on death row today. If acquitted, he would be free. If fairly convicted, he would be serving a life sentence. Indeed, had Mr. Sattazahn been *unfairly* convicted but failed to enforce his constitutional rights, he could not be on death row, because the prosecution could not have appealed his life sentence. David Sattazahn is on Pennsylvania's death row today only because he was unconstitutionally convicted

and enforced his constitutional rights. To permit such a death-after-life sentence is to reward a state's anti-constitutional conduct and punish a defendant for properly and successfully exercising the rights to which he is constitutionally guaranteed. The state has no valid interest in such an arbitrary, capricious, and unprincipled outcome. David Sattazahn's life and liberty interest in the statutorily mandated outcome of his first capital sentencing trial plainly encompasses being free from the subsequent infliction of a death-after-life sentence.

Mr. Sattazahn's liberty interest in respecting and enforcing the life sentence he received *as a matter of law* in his first capital trial is not, however, limited to overturning his death-after-life sentence. Respect for that statutorily mandated sentence necessarily requires that his case be treated as non-capital on retrial and that he not be subjected to practices that could not be directed at a capital-ineligible defendant.

In Mr. Sattazahn's case, this means the right to a *non-capital* jury trial in which jurors opposed to the death penalty are not excluded for cause. This Court has implicitly acknowledged that the trial of a capitally ineligible defendant before a death-qualified jury is justified only when necessary to jointly try that defendant with another who legitimately may be subject to the death penalty. Buchanan v. Kentucky, 483 U.S. 402, 414-25 (1987). There is no conceivable state interest in empaneling a death-qualified jury in a case that does not involve any death-eligible defendant. Moreover, excluding jurors for cause in a non-capital case because of their beliefs about the death penalty is clearly improper. A juror's views about the death penalty are irrelevant in cases in which a defendant is not "eligible" for death. The state has no right to exclude for cause a juror who can fairly determine a defendant's guilt or innocence in a non-capital case, even though his or her views about the death penalty might constitute a substantial

impairment in a capital case.[19] And conversely, a non-capital defendant has no right to exclude for cause in a non-capital case a juror who can fairly determine guilt or innocence, but who would automatically impose a death sentence if the defendant were convicted. When a juror is improperly excused for cause, the defendant's right to an impartial jury is denied and a new trial is required. But even if that were not so, subjecting a non-capital defendant to trial by a death-qualified jury is so presumptively prejudicial and so thoroughly undermines confidence in the judical process and the outcome of the trial itself that it cannot be permitted.

Here, it is undisputed that David Sattazahn could not have been sentenced to death if he had been provided a fair trial in 1991. Had his conviction been upheld, the Commonwealth would have had no opportunity even to appeal the life sentence imposed in his case by operation of law. It is only because the Commonwealth violated his trial rights in the first place that he even faced a second trial. Subjecting Mr. Sattazahn to death-after-life as a reward for vindicating his right to a fair trial does nothing to advance the "overwhelming public interest" that the death penalty be imposed fairly and constitutionally and that "any decision to impose the death sentence be, and appear to [the community to] be, based on reason rather than caprice," vindictiveness, or unfairness.

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[19] There is substantial evidence that death-qualified juries are more prone to convict than juries that do not undergo the death-qualification process, simply by virtue of being asked questions relevant to sentencing, and to convict of more serious charges; and that death-qualified jurors evaluate evidence in a way markedly more favorable to the prosecution than jurors excluded as a result of their opposition to the death penalty; are more likely to hold a defendant's failure to testify against him; are more concerned about erroneous acquittals than erroneous convictions; and require less evidence to find proof of guilt beyond a reasonable doubt. Commonwealth v. Maxwell, 505 Pa. 152, 170-76, 477 A.2d 1309, 1319-22 (1984) (Nix, C.J., dissenting); Lockhart v. McCree, 476 U.S. 162 (1986) (Marshall, J., with Brennan & Stevens, JJ., dissenting).

On the contrary, a death trial after a life sentence fundamentally violates these principles and amounts to an arbitrary deprivation of a defendant's life and liberty interest in the mandatory life sentence that was imposed as a matter of law in his first trial. Permitting David Sattazahn's retrial and death sentence before a death-qualified jury would unquestionably demonstrate that in Pennsylvania death is different, but not in any manner envisioned by the Constitution. This Court should not countenance so clearly arbitrary, capricious, and unjust a result. This Court should grant certiorari and declare that David Sattazahn is entitled not only to the vacation of his death sentence, but to a new trial before a properly constituted jury in which the Commonwealth is precluded from seeking death.

CONCLUSION

For all the foregoing reasons, this Court should grant this Petition for Writ of Certiorari to the Pennsylvania Supreme Court to resolve the disputed issues of law and to reverse Petitioner's death sentence.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2001

DAVID ALLEN SATTAZAHN
Petitioner

V.

COMMONWEALTH OF PENNSYLVANIA
Respondent

On Petition For Writ of Certiorari To The
Supreme Court of Pennsylvania

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. **Does the Double Jeopardy Clause allow the prosecution to seek the death penalty in a capital retrial after petitioner won a new trial on appeal when the first jury deadlocked in the penalty phase of the first trial?**

   Answered in the affirmative by the court below

   Suggested Answer: Yes

2. **Does the Due Process Clause allow the prosecution to seek the death penalty in a capital retrial after the petitioner won a new trial on appeal when the second jury knows nothing about the first trial?**[1]

   Answered in the affirmative by the court below

   Suggested Answer: Yes

[1] This Court should be aware that these issues were presented to this Court in a previous Petition for Writ of Certiorari filed by Petitioner on or about May 30, 1997, assigned to No. 97-5451. That petition was denied by order of this Court dated October 6, 1997.

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OPINIONS BELOW

The November 27, 2000 Opinion of the Supreme Court of Pennsylvania, ***Commonwealth v. Sattazahn***, 563 Pa. 533, 763 A.2d 359 (2000),is reproduced at petitioner's appendix A. The July 20, 2001 Order of the Supreme Court of Pennsylvania denying reargument, ***Commonwealth v. Sattazahn***, No. 258-01 Capital Appeal Docket, 2001 WL 826060 (July 20, 2001), is reproduced at petitioner's appendix B.

JURISDICTION

This Court has jurisdiction to consider the petition pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> nor shall any state deprive any person of life, liberty, or property, without due process of law.

COUNTERSTATEMENT OF THE CASE

This brief is filed in opposition to the request for *certiorari* filed by David Sattazahn. Petitioner, from the sentence of death imposed by the Honorable Scott D. Keller in the Court of Common Pleas, Berks County, Pennsylvania, entered pursuant to the verdict of the jury recorded on January 22, 1999 pursuant to Petitioner's second trial. Petitioner was originally found guilty of first degree murder on May 10, 1991, at which time the jury deadlocked on the death penalty issue, and Petitioner was subsequently successful in obtaining a new trial on appeal.

Procedural History

David Sattazahn was arrested around July 17, 1989, for the murder of Richard Boyer and charged by Information filed at Docket No. 2194/89, in the Court of Common Pleas of Berks County, Pennsylvania. On or about September 14, 1989, the Commonwealth filed a Notice To Seek The Death Penalty.

From April 23 through May 10, 1991, Sattazahn was tried on these charges by a jury before the Honorable Scott D. Keller and convicted of first[1], second[2], and third degree[3] murder, robbery[4], two counts of aggravated assault[5], possession of an instrument of crime[6], carrying a firearm without a license[7], criminal conspiracy[8] to commit third degree murder, robbery, aggravated assault and possession of an instrument of crime.

In the penalty phase of the trial, the Commonwealth presented one aggravating circumstance

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[1] 18 Pa.C.S.A. § 2502(a).
[2] 18 Pa.C.S.A. § 2502(b).
[3] 18 Pa.C.S.A. § 2502(c).
[4] 18 Pa.C.S.A. § 2701(a)(1)(i).
[5] 18 Pa.C.S.A. § 2702(a)(1) and (4).
[6] 18 Pa.C.S.A. § 907(a).
[7] 18 Pa.C.S.A. § 6106(a).
[8] 18 Pa.C.S.A. § 903(a)(1)(2).

- Sattazahn committed the killing while in the perpetration of a felony.[9] Sattazahn presented as mitigating circumstances his lack of a significant history of prior criminal convictions and his age at the time of the crime. The jury deliberated without reaching a decision on death or life and without making any findings with regard to aggravating or mitigating factors. After three-and-one-half hours of deliberations, at the request of defense counsel, Judge Keller dismissed the jury as hung.

A few short months after the trial, on September 19, 1991, Sattazahn entered guilty pleas in the following cases in Berks County:

Docket	Charge	Offense Date
1419-89	Burglary	9/21/87
1982-89	Robbery	12/4/88
1983-89	Burglary	3/30/85 - 4/2/85
1984-89	Burglary	3/11/88 - 3/12/88
1985-89	Burglary	6/19/87 - 6/20/87
1986-89	Burglary	4/1/89 - 4/3/89

On February 14, 1992, Sattazahn was sentenced on the above charges, as well as being sentenced to life imprisonment on the first degree murder charge along with various consecutive sentences on the remaining convictions from trial which had not merged. On or about March 12, 1992, Sattazahn appealed his sentence at No. 2194/89 to the Pennsylvania Superior Court. Shortly thereafter, on March 17, 1992, Sattazahn entered a guilty plea to third degree murder in Schuylkill County, Pennsylvania, for a murder he had committed on December 26, 1987. On April 1, 1992, Sattazahn entered a guilty plea for burglary charges in Lebanon County, Pennsylvania.

On the direct appeal at No. 2194/89, the Pennsylvania Superior Court found there was insufficient evidence to support a conviction on the conspiracies to commit third degree murder and aggravated assault, thereby arresting judgment and dismissing these charges. Based on a jury

[9] 42 Pa.C.S.A. § 9711(d)(6).

instruction given pursuant to 18 Pa.C.S.A. § 6104, the Superior Court reversed and remanded for a new trial on the remaining charges. The Commonwealth sought reargument, which was denied on October 6, 1993. ***Commonwealth v. Sattazahn***, 428 Pa. Super. 413, 631 A.2d 597 (1993). The Commonwealth filed a Petition for Allowance of Appeal solely on the issue of the jury instruction given pursuant to 18 Pa.C.S.A. § 6102 and § 6104. Sattazahn filed a cross-petition on other issues. On April 15, 1994, the Supreme Court of Pennsylvania initially granted the Commonwealth's petition and denied Sattazahn's cross-petition, but then, on December 30, 1994, the Court dismissed the appeal as improvidently granted. ***Commonwealth v. Sattazahn***, 539 Pa. 270, 652 A.2d 293 (1994).

On March 9, 1995, in preparation for the retrial, the Commonwealth filed a Notice of Intent To Seek The Death Penalty And Specific Aggravating Circumstances for the penalty phase of the retrial. This notice set forth the circumstances presented at the first trial and added the circumstance that the defendant has a significant history of felony convictions involving the use or threat of violence to the person.[10]

On March 13, 1995, Sattazahn, through his attorney, John S. Elder, Esquire, filed a Motion to Prevent the Commonwealth from Seeking the Death Penalty and from Adding an Additional Factor in his retrial. After briefs and argument by the parties, Judge Keller denied Sattazahn's motion on May 31, 1995. On June 26, 1995, Sattazahn filed a notice of appeal from the trial court's order denying his motion. On April 18, 1996, a panel of the Pennsylvania Superior Court affirmed the judgment of the trial court. ***Commonwealth v. Sattazahn***, No. 02274 PHL 1995 (filed April 18, 1996). On June 21, 1996, reargument/reconsideration of the April 18, 1996 decision was denied by *per curiam* order of the Superior Court. On March 5, 1997, the Supreme Court of Pennsylvania

denied Sattazahn's petition for allowance of appeal. ***Commonwealth v. Sattazahn***, No. 469 M.D. Allocatur Dkt. 1996 (March 5, 1997).

Sattazahn then filed a Petition for *Writ of Certiorari* with this Court on or about May 30, 1997. This petition as denied by order of court dated October 6, 1997, and the second trial was scheduled.

On January 22, 1999, Petitioner was found guilty on all charges and the jury returned a verdict of death. This sentence was entered by the court on February 16, 1999, and Petitioner filed his appeal to the Supreme Court of Pennsylvania on February 26, 1999 challenging the same issues raised prior to trial - the propriety of the death penalty upon retrial. On November 27, 2000, the Supreme Court of Pennsylvania affirmed the sentence, ***Commonwealth v. Sattazahn***, 563 Pa. 533, 763 A.2d 359 (2000), and subsequently denied Petitioner's request for reargument. ***Commonwealth v. Sattazahn***, No. 258-01 Capital Appeal Docket, 2001 WL 826060 (July 20, 2001).

Sattazahn now files this second Petition for Writ of Certiorari requesting this Honorable Court to review the sole question of whether the Commonwealth has the right to seek the death penalty in his retrial for first degree murder - the same question presented in the petition which was denied by this Court on October 6, 1997.

Factual History

On four or five occasions, Sattazahn and Jeffrey Scott Hammer hid in pine trees behind Heidelberg Family Restaurant and watched the manager come out at night with the money bag. (Notes of Testimony, Trial 1/15/99 - 1/22/99[11], p. 268-269). They cleared an area in this wooded area so they could see the restaurant more clearly. (N.T. p. 270). They learned that the manager

[10] 42 Pa.C.S.A. § 9711(d)(9).
[11] Hereinafter reffered to as "N.T."

would be the last person to leave the restaurant at night and that on Sundays the restaurant did the most business. (N.T. p. 269, 277).

On Palm Sunday, April 12, 1987, at approximately 10:00 p.m., Sattazahn and Hammer hid in the cleared wooded area waiting to rob the manager. (N.T. p. 275). Hammer carried a .41 caliber Magnum revolver and Sattazahn had a .22 caliber Ruger semi-automatic pistol. (N.T. p. 274, 283). Around 11:00 p.m., Richard Boyer, the manager, closed the restaurant and began walking towards his car, carrying a bank deposit bag with the day's receipts. (N.T. p. 275, 281-282). Sattazahn and Hammer confronted Mr. Boyer with their guns drawn and demanded the money. (N.T. p. 283-284)

Mr. Boyer raised his hands but threw the bag towards the restaurant. (N.T. p. 284). Irritated, Sattazahn told him to get the bag. (N.T. p. 284). Mr. Boyer retrieved the bag, but then he again threw it towards the restaurant's roof and started to run away. (N.T. p. 284-286). Hammer fired one shot over Mr. Boyer's head as a warning. (N.T. p. 287). Sattazahn fired the .22 five times. (N.T. p. 211, 288). Mr. Boyer fell to the ground and the two gunmen, after grabbing the bank deposit bag, fled. (N.T. p. 288-290).

An autopsy showed that Mr. Boyer suffered two gunshot wounds in the lower back and one each in the left shoulder, the lower face and the back of the head. (N.T. p. 412-416). Several of the wounds were consistent with being caused by a .22 caliber bullet. (N.T. p. 412-416). The two slugs recovered from Mr. Boyer's body, as well as the five discharged cartridge cases found at the scene, were identified as being fired from the .22 caliber Ruger purchased by Sattazahn. (N.T. p. 211, 224, 229-242).

REASONS FOR DENYING THE WRIT

Sattazahn seeks discretionary review of the opinion of the Supreme Court of Pennsylvania on the grounds that the Supreme Court incorrectly decided the double jeopardy issue and the due process issue under the United States Constitution. This Honorable Court previously decided that the imposition of a higher sentence by a jury on retrial after reversal of a prior state conviction did not violate the double jeopardy clause or the due process clause. Therefore, Sattazahn's petition for writ of *certiorari* should be denied.

1. THE DOUBLE JEOPARDY CLAUSE DOES NOT PROHIBIT SEEKING THE DEATH PENALTY UPON RETRIAL BECAUSE PETITIONER WAS NOT ACQUITTED DURING THE DEATH PENALTY PHASE OF THE FIRST TRIAL.

Long established constitutional doctrine imposes no limitations whatsoever upon the power to retry a defendant who has succeeded in getting his first conviction set aside. ***North Carolina v. Pearce***, 395 U.S. 711, 719 (1969) (***citing Stroud v. United States***, 251 U.S. 15 (1919)). This constitutional guarantee also makes clear that the guarantee against double jeopardy imposes no restrictions upon the length of a sentence imposed upon reconviction. ***Id.*** at 719 (***citing United States v. Ball***, 163 U.S. 662 (1896)). These principles rest on the premise that the original conviction has, at the defendant's behest, been wholly nullified and the slate wiped clean. ***Id.*** at 721. "[A] corollary of the power to retry a defendant is the power, upon the defendant's reconviction, to impose whatever sentence may be legally authorized, whether or not it is greater than the sentence imposed after the first conviction." ***Id.*** at 720.

However, this power to resentence upon reconviction is not unfettered. Under ***Bullington v. Missouri***, 451 U.S. 430 (1981) and ***Arizona v. Rumsey***, 467 U.S. 203 (1984), the relevant inquiry is whether the sentencing judge or the reviewing court has decided that the prosecution has not proven

its case for the death penalty in the first trial and hence has acquitted the petitioner. ***Poland v. Arizona***, 476 U.S. 147 (1986). Thus an exception has been created and the clean slate rationale is inapplicable whenever an acquittal results in the death penalty phase of the trial from an agreement by a jury or a decision by an appellate court that the prosecution has not proven its case. ***Id.*** at 152. " '[T]he clean slate rationale…is inapplicable whenever a jury agrees or an appellate court decides that the prosecution has not proved its case.' " ***Id.*** at 152 (***citing Bullington v. Missouri***, 451 U.S. 430, 443 (1981)). In situations where a defendant has been acquitted in the first trial, either at the guilt phase or the death penalty phase of the trial, double jeopardy would apply and prevent the resentencing court from imposing a punishment greater than that originally imposed.

This is the basis of the argument presented by petitioner. Sattazahn alleges that because the jury deadlocked in the death penalty phase of the first trial, the trial court's imposition of the life sentence by application of law was tantamount to an acquittal, which would bar the prosecution from seeking the death penalty in the retrial. To support his cause, Sattazahn largely relies on ***Bullington*** and ***Rumsey***[12]. However, petitioner fails to recognize the critical distinctions between those cases and the instant case[13].

In ***Bullington***, the prosecution intended to seek the death penalty in defendant's retrial when the jury in defendant's first trial had found defendant guilty of first-degree murder but then had sentenced him to life imprisonment after a separate sentencing phase. ***Bullington*** at 435. This Honorable Court held that the protection afforded by the double jeopardy clause of the Fifth Amendment to a person acquitted by a jury was available to a person convicted of capital murder and

---

[12] Neither ***Bullington*** nor ***Rumsey*** stand for the proposition that a deadlocked jury in the death penalty phase is the equivalent of acquittal. In fact, no cases cited by petitioner support this allegation.

[13] Petitioner also relies on ***Smalis v. Pennsylvania***, 476 U.S. 140 (1986) in support of his argument. However, this reliance is misplaced. ***Smalis*** stands for the principle that a demurrer granted in defendant's favor constitutes an acquittal for double jeopardy purposes, therefore barring retrial. Obviously those facts are

sentenced to life imprisonment by the jury, with respect to the death penalty, at his retrial, since the sentencing procedure at the defendant's first trial was like the trial on the question of guilt or innocence and the sentence of life imprisonment at the first trial meant that the jury had already acquitted the defendant of whatever was necessary to impose the death sentence. ***Bullington*** at 446.

The defendant in ***Rumsey*** was convicted by a jury of armed robbery and first degree murder, but the trial judge conducted a separate sentencing hearing in which the judge found no aggravating circumstances. ***Rumsey*** at 206-207. The finding of no aggravating circumstances statutorily barred the judge from sentencing the defendant to death, and thus, the trial judge sentenced the defendant to life imprisonment. ***Id.*** Upon the setting aside of the sentence of life imprisonment by the Arizona Supreme Court, the trial court held a new sentencing hearing and sentenced the defendant to death. ***Id.*** On *certiorari*, this Honorable Court held that the double jeopardy clause prohibited the state from sentencing the defendant to death after the life sentence he had initially received was set aside on appeal since Arizona's capital sentencing proceeding was like a trial and the defendant's initial sentence of life imprisonment constituted an acquittal of the death penalty. ***Id.***

The present case is easily distinguished from both ***Bullington*** and ***Rumsey.*** In those cases, the trial court deliberated over numerous facts and made a specific finding as to what the appropriate penalty should be in the first trial. Thus the penalty imposed by the court in the first trial was based upon an educated and well-reasoned conclusion. However, in the case at bar, the jury deadlocked regarding the appropriate penalty, thus no conclusion was reached. When a jury is deadlocked, it cannot reach a unanimous verdict and consequently cannot acquit or convict a defendant of the death penalty. The trial judge which imposes the life sentence when a jury does not reach a unanimous verdict in the penalty phase of a capital trial makes no factual determinations either - he merely

distinguishable from those in the case at bar in that demurrer was not awarded to petitioner.

follows the letter of the law over which he has no discretion. See 42 Pa.C.S.A. §9711(c)(1)(v)[14]. As a result, the death penalty phase of the first trial was never tried to completion because a verdict was not rendered. Thus because no decisions are made as to the merits of the applicability of the death penalty when a jury is deadlocked, the clean slate rationale is applicable to the present case and petitioner's argument fails.

In this respect, the instant case is more like the facts of ***Chaffin v. Stynchcombe***, 412 U.S. 17 (1973). In ***Chaffin***, this Court was asked to judge the constitutionality of the jury's imposition of a life sentence upon retrial when the first jury only sentenced petitioner to 20 years imprisonment. ***Id.*** at 18. The court examined the long-standing principles espoused by this court in ***Pearce*** and ***Stroud***, the latter of which was a unanimous opinion, finding that once the first conviction was overturned, the slate was wiped clean. ***Id.*** at 23. This Court specifically chose not to overrule ***Stroud***, resulting in the allowance of a harsher sentence upon retrial. ***Id.*** Similarly, Sattazahn's original conviction has, at his own behest, been wholly nullified and the slate wiped clean. According to this Court's interpretation of our constitution, the Commonwealth has the power, upon Sattazahn's reconviction, to impose whatever sentence may be legally authorized, whether or not it is greater than the sentence imposed after his first conviction. Therefore, the imposition of the death penalty in Sattazahn's retrial was proper and accordingly, *certiorari* should be denied.

[14] Petitioner would have this Court believe that this imposition of a life sentence by operation of law acts as an "implied acquittal," but there is no foundation for this proposition. This Court's precedent does not recognize this term. Because "the law attaches particular significance to an acquittal," see ***Poland*** at 156 (***citing United States v. Scott***, 437 U.S. 82, 91 (1978)), this argument should not be taken lightly and this Court should not create additional exceptions when there is no legal authority to do so.

2. THE DUE PROCESS CLAUSE DOES NOT BAR THE PROSECUTION FROM SEEKING THE DEATH PENALTY UPON RETRIAL BECAUSE THE IMPOSITION OF THE DEATH PENALTY BY THE SECOND JURY, WHO KNEW NOTHING ABOUT THE FIRST TRIAL, COULD NOT BE A RESULT OF VINDICTIVENESS[15].

Although the Due Process Clause can be implicated upon the imposition of a harsher sentence upon retrial, the constitutional implications are not automatic. In order to invoke Fourteenth Amendment protections, petitioner must be able to show that the greater sentence was the result of vindictiveness on the part of the sentencing authority for the convict's successful attack of the first conviction. ***See Pearce, supra*** at 725. These protections exist to ensure that a convict does not forego his right to appeal out of fear of any future retaliatory action of the trial judge. ***Id.*** However, due process implications can be avoided if the resentencing court places adequate information on the record explaining the basis for the increased sentence. ***Pearce*** at 726.

In determining whether the ***Pearce*** rationale extends to a harsher sentence at trial after withdrawal of a guilty plea, this Court held that:

> While the ***Pearce*** opinion appeared on its face to announce a rule of sweeping dimension, our subsequent cases have made clear that its presumption of vindictiveness does not apply in every case where a convicted defendant receives a higher sentence on retrial. ***Texas v. McCollough***, 475 U.S. 134 (1986). As we explained in ***Texas v. McCollough***, the evil the ***Pearce*** Court sought to prevent was not the imposition of enlarged sentences after a new trial but vindictiveness of a sentencing judge. ***Ibid.*** *See also* ***Chaffin v. Stynchombe***, 412 U.S. 17 (1973) (the ***Pearce*** presumption was not designed to prevent the imposition of an increased sentence on retrial for some valid reason associated with the need for flexibility and discretion in the sentencing process, but was premised on the apparent need to guard against vindictiveness in the resentencing process).

Alabama v. Smith, 490 U.S. 794, 799 (1989). Consequently, this Court rejected the proposition that

[15] Sattazahn's argument regarding this issue is misguided. Although long-standing precedent has consistently employed the degree of vindictiveness as the test against which to measure the constitutional due process provisions, petitioner has chosen to ignore this guide and submit a legal argument virtually devoid of precedential authority.

greater penalties on retrial were explained by vindictiveness with sufficient frequency to warrant the imposition of a prophylactic rule. ***Id.*** at 800.

In order to determine whether vindictiveness is present, the court should examine whether the second sentencing authority was aware of the penalty imposed by the first, the motive of the first sentencing authority to vindicate the prior sentence, and the interest in the sentencing authority to discourage meritless appeals. ***Chaffin*** at 26-27. When the second sentencing authority is a jury rather than a judge, it is almost axiomatic that vindictiveness does not exist. Juries do not have knowledge of the prior sentence, have no personal interest in the outcome of the case, and are not often sensitive to the institutional concerns regarding meritless appeals. ***Id.*** at 27-28. Thus the presumption of vindictiveness does not arise when a second jury, on retrial following a successful appeal, imposes a higher sentence than a prior jury. ***Id.*** at 26-27. A second jury, unlike the judge who has been reversed, will have no personal stake in the prior conviction and no motivation to engage in self-vindication. ***Id.*** at 27. Consequently there is no basis for holding that jury resentencing poses any real threat of vindictiveness. ***Id.*** at 28. Thus, the rendition of a higher sentence by a jury upon retrial does not violate the Due Process Clause so long as the jury is not informed of the prior sentence and second sentence is not otherwise shown to be a product of vindictiveness. ***Id.*** at 35.

This is the reason the ***Pearce*** presumption of vindictiveness does not apply to the present case. In Sattazahn's retrial, a second jury imposed the death penalty. During the course of Sattazahn's new trial, the court was excruciatingly careful to avoid any reference whatsoever to the fact that Sattazahn was subject to a first trial, even to the extent of making sure one of the first trial's exhibits, which included an area marked by a witnesses' initials during the first trial, were not used in the second trial. (N.T. p. 9, 147-148). As a result of these precautions, the jury was not aware of the

existence of the first trial, let alone the prior sentence. Thus the jury could not be vindictive towards petitioner for a successful appeal when they had no knowledge that prior court proceedings had taken place at all. Thus because vindictiveness is not present, the Commonwealth has the power, upon Sattazahn's reconviction, to impose whatever sentence may be legally authorized, whether or not it is greater than the sentence imposed after his first conviction. Therefore, the Commonwealth has the power to seek the death penalty in Sattazahn's retrial.

As this analysis dictates, the Due Process Clause is not offended by the possibility of a harsher sentence. The Pennsylvania decision which is questioned by Sattazahn before this Court, ***Commonwealth v. Martorano***, 535 Pa. 178, 634 A.2d 1063 (1993), reflects the thoughtful and thorough review and application by the Pennsylvania Supreme Court of this Honorable Court's prior decisions in ***Pearce*** and its progeny. Because this analysis is correctly grounded in well-established precedent, Sattazahn's claim is meritless and *certiorari* should be denied.

CONCLUSION

For the foregoing reasons, the Commonwealth of Pennsylvania respectfully requests this Honorable Court to deny this petition for a writ of *certiorari*.

Respectfully Submitted,

2/5/02
Date

MARK C. BALDWIN
District Attorney

2 5 02
Date

ALISA R. HOBART
Assistant District Attorney

IN THE SUPREME COURT OF THE UNITED STATES

DAVID ALLEN SATTAZAHN,	:	**01-7574**
Petitioner	:	
	:	
VS.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	**Response to Petition for**
Respondent	:	**Writ of Certiorari**

PROOF OF SERVICE

TO THE CLERK OF THIS HONORABLE COURT:
IN THE SUPREME COURT OF THE UNITED STATES

I, **Alisa R. Hobart**, Berks County District Attorney, a member of the Bar of the Supreme Court of the United States and Counsel of Record for the Commonwealth of Pennsylvania, do hereby certify that on February 5, 2002, pursuant to Rule 29, Rules of the Supreme Court, I served one (1) copy of the Commonwealth's Response to Petitioner's Petition for Writ of Certiorari on the following persons:

Robert B. Dunham, Esquire
Anne L. Saunders, Esquire
Defender Association of Philadelphia
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John T. Adams, Esquire
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Alisa R Hobart

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Dated: February 5, 2002

OFFICE OF THE
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First Assistant
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Office Supervisor
Sara Hertzog

February 5, 2002

William K. Suter, Clerk of Court
Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

RE: David A. Sattazahn v. Commonwealth of Pennsylvania
01-7574
Response to Petition for Writ of Certiorari

Dear Mr. Suter:

Enclosed please find the original and ten (10) copies of the Commonwealth's Response to petitioner's Petition for Writ of Certiorari in the above-captioned case along with a Proof of Service.

Should you have any questions, don't hesitate to contact me directly. Thank you for your attention in this matter.

Sincereley,

Alisa R Hobart

ALISA R. HOBART
Assistant District Attorney
Berks County, Pennsylvania

ARH/bg

cc: Robert B. Dunham, Esquire
Anne L. Saunders, Esquire
John T. Adams, Esquire

:enclosures

RECEIVED
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No. 01-7574

In The Supreme Court of the United States

DAVID ALLEN SATTAZAHN,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Pennsylvania

JOINT APPENDIX

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Attorneys for Respondent

Petition For Writ Of Certiorari Filed December 17, 2001
Certiorari Granted March 18, 2002

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

CAPITAL CASE

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11:25 A.M.

Supreme Court of Pennsylvania [LOGO] **Capital Appeal Docket Sheet**

Docket Number: 258 CAP

May 28, 2002

COMMONWEALTH OF PENNSYLVANIA, Appellee

v.

DAVID ALLEN SATTAZAHN, Appellant

Initiating Document:	Notice of Appeal
Case Status:	Decided/Active
Journal Number:	J-64-2000
Date Listed Submitted:	May 1, 2000
Case Category:	Capital
Case Type:	Includes Lesser Offenses

DOCKET ENTRIES

Filed Date	Docket Entry/ Document Name	Party Type	Filed By
February 25, 1999	Notice of Appeal Filed		
July 28, 1999			
Comments:	(Appellant's) Petition for Extention of Time to File Brief, filed. [UNOPPOSED – for 59 days]		

August 3, 1999			
Comments:	AND NOW, this 3rd day of August, 1999, Appellant's Petition for Extension of Time to File Brief is granted. Appellant's brief is due to be filed on or before 10/22/99. No additional extensions of time will be granted. s/ JOHNS, Prothonotary		
October 7, 1999			
Comments:	(Appellant's) Petition for Extension of Time to File Brief, filed. [For 30 days]		
October 21, 1999			
Comments:	ORDER: AND NOW, this 21st day of October, 1999, Appellant's Petition for Extension of Time to File Brief is granted. Appellant's brief is due to be filed on or before 11/22/99. s/ JOHNS, Prothonotary		
November 12, 1999	Appellant Brief		
November 22, 1999	Amicus Brief		
December 9, 1999	Appellee Brief		
May 1, 2000	Oral Argument		
November 27, 2000	Affirmed		Newman, Sandra Schultz
November 27, 2000	Judgment Entered		Office of the Prothonotary
December 11, 2000	Application for Reargument	Appellant	DAVID ALLEN SATTAZAHN

December 21, 2000			
	No BIO Letter	Appellee	COMMONWEALTH OF PENNSYLVANIA
July 20, 2001	Order Denying Application for Reargument		Per Curiam
Comments:	AND NOW, this 20th day of July, 2001, appellant's application for Reargument is hereby DENIED.		
July 23, 2001	Order Exited		Supreme Court
October 4, 2001	Notice of Extension of Time Granted		Clerk of the U.S. Supreme Court
Comments:	(Extension to file Writ of Certiorari granted until 12/17/2001)		
December 17, 2001	Petition for Writ of Certiorari		Clerk of the U.S. Supreme Court
March 18, 2002	Petition for Writ of Certiorari Granted		Clerk of the U.S. Supreme Court

04/09/97 SUPERIOR COURT OF PENNSYLVANIA
0823 OFFICIAL DOCKET

DOCKET # 002274PHL95

DOCKET ENTRIES		FOR
07/03/95	NOTICE OF APPEAL IFP	
07/03/95	DOCKETING STATEMENT EXITED	
08/22/95	LOWER COURT RECORD RECEIVED 08/05/95 LOWER COURT RECORD DUE AND 11 VOLS TESTIMONY FILED.	
09/29/95	MOT EXT OF TIME TO FILE BRIEFS 1ST	001T
10/11/95	MOT FOR EXT OF TM TO FL BRF GRANTD	001T
	10/23/95 APPELLANT'S BRIEF DUE	
10/23/95	APPELLANT BRIEF FILED	001T
	10/23/95 APPELLANT'S BRIEF DUE	
11/03/95	RPLY LETTER(S) PRINTED	001T
11/22/95	PRAECIPE FOR APPEARANCE IVA C. DOUGHERTY, ESQ.	999E
11/22/95	APPELLEE BRIEF FILED	999E
	11/22/95 APPELLEE'S BRIEF DUE	
11/30/95	REPLY RECEIVED (ARGUMENT)	
	11/23/95 REPLY DUE APPELLANT	
05/01/96	MOT FOR REARGUMENT WITH BRIEFS	001T
05/10/96	ANS TO MOT FOR REARGUMENT	999E
06/21/96	MOT FOR REARGUMENT DENIED	
	06/30/96 REARGUMENT 60 DAYS DECISION REQ;	001T

07/18/96	MOT FR ALLOW OF APPEAL IN SUP CRT
03/05/97	DENIAL OF APPEAL IN SUPREME COURT
04/09/97	REMITTED

SESSION DATA

START DATE	02/13/96	LOCATION	PHILA-DELPHIA
LISTED/ HEARD DATE	02/13/96	DAILY LIST NO.	015
JUDGES JOURNAL NO.	J-A08015-96	PANEL NO./ EN BANC	A08
ATTORNEY REQUESTED	A	ASSIGNED/ ACTUAL	S
DECISION DATE	04/18/96	JUDGEMENT DATE	04/18/96

DECISION AFFIRMED

PANEL JUDGE(S) OPINION(S) FILED
MCEWEN, S
TAMILIA, P
BROSKY, J DISSENTING MEMO

SUPREME COURT DATA
07/18/96 MOT FR ALLOW OF APPEAL IN SUP CRT
ALLOCATUR DOCKET NO.: 00469MAL96
03/05/97 DENIAL OF APPEAL IN SUPREME COURT

T=APPELLANT E=APPELLEE *=COURT APPOINTED

6/17/99 Berks County Criminal Justice Information System PAGE- 1

COURT CASE: 89 2194 CASE SUMMARY D.J. CASE: 22 89 160

DEFENDANT:
Sattazahn, David Allen ID#: 35601
201 Progress Rd.

Newmanstown PA 17073

COMPLAINT FILED: 7/17/1989 RULE 1100
DATE- CURRENT: 1/21/1991 ORIG.: 1/13/1990

ID#: 35998
ID#: 2587

CODEFENDANTS: Hammer, Jeffrey Scott
AFFIANT : McClure, Tpr. William J.

ASSIGNED JUDGE : Scott D. Keller, P.J.

ATTORNEYS: D Adams, John T.
D Miles, Kimberly A.

CONSOLIDATIONS: 89 02190

* * *

CASE ACTIVITY SUMMARY:

7/17/1989 Complaint, filed.

* * *

9/14/1989 Notice to Seek Death Penalty under 42 PA C.S. 9711(d)

* * *

5/09/1991 Guilty verdict entered.
5/09/1991 Recordation of verdict

* * *

5/09/1991 Trial – jury held [penalty phase]

* * *

2/14/1992 Sentence entered.
2/14/1992 Commitment issued to Sheriff.
2/14/1992 Sentence hearing held

* * *

11/22/1993 Appeal returned from Pa. Superior Court – decision reversed.

* * *

4/20/1994 Supreme Ct. order: Cross-petition to allow appeal – Denied.

* * *

1/20/1995 Appeal returned from Pa. Supreme Court – dismissed.

* * *

3/09/1995 Notice of Intent to Seek Death Penalty & Spcf. Aggr. Factors
3/09/1995 Memo. of Law in Support of the Add. of an Aggravating Factor
3/09/1995 Motion to Prevent Cmmnwth. from Seeking Death Penalty

* * *

5/25/1995 Deft.'s Brief in Support of Mtn. to Prevent the Commonwealth from Seeking the Death Penalty in Deft.'s Retrial

5/26/1995 Commonwealth's Brief: The Death Penalty in a Retrial for First Degree Murder

* * *

5/31/1995 Order re: Motion to Prevent the Commonwealth from seeking the Death Penalty – DENIED; Motion to Prevent the Cmmnwlth. from Adding an Additional Factor – DENIED

* * *

6/21/1995 Deft.'s Appeal to Pa. Superior Court of Order 5/31/95

* * *

7/19/1995 Opinion, filed.

* * *

4/14/1997 Appeal returned from Pa. Superior Court – decision affirmed.

4/14/1997 RECORDS RETURNED

* * *

4/25/1997 Order Continuing matter to allow Deft. to file Petition to higher court

* * *

12/29/1998 Pretrial hearing held

* * *

1/22/1999 Guilty verdict entered.
1/22/1999 Sentencing Verdict Slip, filed.
1/22/1999 Commitment issued to Sheriff.
1/22/1999 Recordation of verdict
1/22/1999 Recordation of verdict – Penalty Phase

* * *

2/16/1999 Sentence entered.
2/16/1999 Commitment issued to Sheriff.

2/16/1999 Sentence hearing held
2/25/1999 Deft.'s Appeal to Pa. Supreme Court of Order 2/16/99

* * *

6/11/1999 Opinion, filed.

COMMONWEALTH OF PENNSYLVANIA	:	In the Court of Common Pleas of Berks County, Pennsylvania Criminal
vs.	:	
DAVID ALLEN SATTAZAHN	:	No. 2194/89

TRIAL BY JURY — PENALTY PHASE
Thursday, May 9, 1991
Friday, May 10, 1991
Reading, Pennsylvania

Before THE HONORABLE SCOTT D. KELLER, Judge and a Jury.

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* * *

[19] THE COURT: Let's do it.

(Whereupon the conference in the retiring room was concluded at 3:20 p.m.)

(Jury entering the courtroom at 3:22 p.m.)

THE COURT: Ladies and gentlemen of the jury, you have found the defendant guilty of first degree murder. We are now going to hold a sentencing hearing. Counsel may present additional evidence and make further arguments, then you will decide whether to sentence the defendant to death or life imprisonment. The sentence you will impose depends on whether you find any of the things that the Pennsylvania Sentencing Code calls aggravating or mitigating circumstances. Loosely speaking, aggravating circumstances are things about the

killing and the killer which make a first degree murder case more terrible and deserving of the death penalty, while mitigating circumstances are those things which make the case less terrible and less deserving of the death penalty. Aggravating circumstances must be proven by the Commonwealth beyond a reasonable doubt, while mitigating circumstances must be proven by the defendant by a preponderance of the evidence, that is, by the greater weight of the evidence.

It may help you to have in mind some of the things that the Pennsylvania Sentencing Code says are aggravating and [20] mitigating circumstances. Aggravating circumstances include whether or not the killing occurred during the perpetration of a felony. Mitigating circumstances may also include whether or not the defendant has a history of criminal convictions, whether his age at the time of the offense is of mitigation, and other factors of the character and record of the defendant or the circumstances of his offense.

Now, at this time we'll ask the Commonwealth whether or not they have any additional testimony to present?

MR. BALDWIN: Thank you, Your Honor. Your Honor, at this time we have no additional witnesses. We would move at this time that all the trial evidence, all the trial testimony be incorporated in this proceeding. Thank you.

THE COURT: All right, that will be granted.

Ladies and gentlemen, you may consider in this phase of the trial all the testimony and all the evidence that was

admitted in the guilt or innocence phase as it may relate to the issues of aggravating and mitigating circumstances.

Now, Mr. Elder, do you have evidence to present in mitigation?

MR. ELDER: Yes, Your Honor. I think Mr. Baldwin and I have reached a stipulation, that David Sattazahn has no history of prior convictions.

MR. BALDWIN: That's correct, sir.

* * *

COMMONWEALTH OF PENNSYLVANIA	:	In the Court of Common Pleas of Berks County, Pennsylvania Criminal
vs.	:	
DAVID ALLEN SATTAZAHN	:	No. 2194/89

TRIAL BY JURY — PENALTY PHASE
Thursday, May 9, 1991
Friday, May 10, 1991
Reading, Pennsylvania

Before THE HONORABLE SCOTT D. KELLER, Judge and a Jury.

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* * *

[32] (Reading, Pennsylvania, Friday, May 10, 1991 at 9:27 a.m.)

(The defendant is present.)

(Whereupon the following occurred in the retiring room:)

THE COURT: First thing we need to address on the record is the Court is going to change my ruling with regard to one of the defendant's requested points for charge. I must have been thinking of pre-1989 material I read or something. With regard to No. 5, the request is, if you, the jury, cannot reach a unanimous agreement as to the sentence, the Court shall sentence the defendant to life imprisonment. I'm going to refuse it as written and will include it, however, in modified form. That language does, in fact, occur in the instructions to the sentencing verdict

slip and also will be included in my charge to the jury. So I just wanted to make that correction. Do you understand?

MR. ELDER: Yes.

THE COURT: Okay. Now, I have prepared a general instructions and verdict slip in conformity with Rule 358A. In reviewing the evidence presented at the sentencing hearing, the Court believes that there is evidence concerning one aggravating factor, that being the defendant committed a killing while in the perpetration of a felony. The Court also believes there was evidence submitted upon the following mitigating circumstances, and for both of the mitigating I

* * *

COMMONWEALTH OF PENNSYLVANIA	:	In the Court of Commo Pleas of Berks County,
vs.	:	Pennsylvania Criminal
DAVID ALLEN SATTAZAHN	:	No. 2194/89

TRIAL BY JURY — PENALTY PHASE
Thursday, May 9, 1991
Friday, May 10, 1991
Reading, Pennsylvania

Before THE HONORABLE SCOTT D. KELLER, Judge and a Jury.

* * *

[55] CHARGE OF THE COURT

JUDGE KELLER charged the Jury as follows:

Members of the Jury, you must now decide whether to sentence the defendant to death or life imprisonment. Your sentence will depend upon what you find about aggravating and mitigating circumstances. The Sentencing Code defines aggravating and mitigating circumstances. They are things that make a first degree murder case either more terrible or else less terrible. Your verdict must be a sentence of death if you unanimously find, that is all of you find, at least one aggravating circumstance and no mitigating circumstance, or if you unanimously find one or more aggravating circumstances which outweigh any mitigating circumstances. If you do not all agree on one or

the other of these findings then the only verdict that you may return is a sentence of life imprisonment.

The Commonwealth must prove any aggravating circumstances beyond a reasonable doubt. This does not mean the Commonwealth must prove the aggravating circumstances beyond all doubt and to a mathematical certainty. A reasonable doubt is the kind of doubt that would cause a reasonable and sensible person to hesitate before acting upon [56] a matter of – upon an important matter in his own affairs. A reasonable doubt must be a real doubt. It may not be one that a juror imagines or makes up to avoid carrying out an unpleasant duty. That's the burden on the aggravating circumstance.

By contrast, the defendant must prove any mitigating circumstance, however he only has to prove it by a preponderance of the evidence, that is, by the greater weight of the evidence. Put the evidence and arguments of the defense on this side, the evidence and arguments on this side of the prosecution with regard to any mitigating (sic) circumstance, and it's the greater weight of the evidence which is the burden of the defense as to a mitigating circumstance.

In this case, under the Sentencing Code, and I remind you, in this case we're not concerned about other cases, we're concerned about what is before you in this case; only the following matters, if proven to your satisfaction, beyond a reasonable doubt, can be aggravating circumstances, and there was one that has been alleged: The defendant committed a killing while in the perpetration of a felony.

In this case, again in this case, under the Sentencing Code the following matters, if proven to your satisfaction

by a preponderance of the evidence, can be mitigating [57] circumstances: That the defendant has no significant history of prior criminal convictions; the age of the defendant at the time of the crime; and a catch-all, any other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense.

You have been given or I will give you a sentencing verdict slip on which to record your verdict and findings. I shall now give you further directions on how to go about reaching a verdict, making findings, and using the verdict slip. As I told you earlier, and as the verdict slip indicates, you must agree unanimously on one of two general findings before you can sentence the defendant to death. They are a finding that there was at least one aggravating circumstance and no mitigating circumstances, or a finding that there are one or more aggravating circumstances which outweigh any mitigating circumstances.

In deciding whether aggravating outweighs mitigating circumstances do not simply count their number. Compare the seriousness and importance of the aggravating with the mitigating. If you all agree on either one of the two general findings then you can and must sentence the defendant to death. When voting on the general findings, you are to regard a particular aggravating circumstance as presented as present only if you all agree that it is present. On the [58] other hand, each of you is free to regard a particular mitigating circumstance as present, despite what other jurors may believe. This different treatment of aggravating and mitigating circumstances is one of the law's safeguards against unjust death sentences. It gives a defendant the full benefit of any mitigating circumstances. It is closely related to the burden of proof of requirements. Remember, the Commonwealth must prove any aggravating

circumstance beyond a reasonable doubt, while the defendant only has to prove any mitigating circumstances by a preponderance of the evidence.

If you do not agree unanimously on a death sentence and on one of the two general findings that was subject – that would support it, then you have two immediate options. You may either continue to discuss the case and deliberate what your verdict should be or, if all of you agree to do so, you may stop deliberating and sentence the defendant to life imprisonment. If you are still unable to agree on a verdict after conscientious and thorough deliberations, report that to me. If it seems to me that you are hopelessly deadlocked it will be my duty to sentence the defendant to life imprisonment.

Read the verdict slip which we will give to you before you begin deliberating. It will help you to set out a [59] procedure and a format for the discussions and deliberations in this area. It tells you, among other things, how to record your sentencing verdict and findings.

It has the name of the defendant, David Allen Sattazahn. It has first degree murder sentencing verdict slip general instructions. This you read. It will again help you formulate the procedure for your deliberations. It has the possible aggravating circumstances, the possible mitigating circumstances, for you to consider under the burden of proofs I have indicated to you. It has further instructions that I have basically read to you. Then you have the sentencing verdict and findings. If you unanimously find either death or life imprisonment then you must fill out this part of the verdict slip. The verdict and its findings, it's sort of self-explanatory. If you find death then you must indicate that you found an aggravating circumstance

and no mitigating circumstances. That's one way that you may find the death penalty. Or, two, that you found one or more aggravating circumstances which outweighed any mitigating circumstances. Then you must list the aggravating circumstance you found. You must also list any mitigating circumstances that one or more of you found that were outweighed by the aggravating circumstance. If you unanimously find life imprisonment you must still indicate on this form that that was your – that's [60] your sentence and that you found that no aggravating circumstance exists or that the mitigating circumstance or mitigating circumstances are not outweighed by any aggravating circumstances and, again, you must list your finding as to aggravating and mitigating circumstances.

Very important to read the instructions here and the verdict slip before you actually begin deliberating.

Now, you must decide sentence. Consider all the evidence and arguments of both the Commonwealth and the defendant, including the evidence you heard during the earlier trial, the evidence that was presented during the sentencing hearing, including the stipulation of counsel that the defendant has no history of prior criminal convictions, as it may relate to the issue of whether or not there exists a mitigating circumstance. Be fair. Do not let yourself be influenced by passion or prejudice.

It was entirely up to the defendant whether to testify in this stage of the proceedings. You must not draw any adverse inference from his silence.

Remember that your verdict is not merely a recommendation, it actually fixes the punishment at death or life imprisonment. Your verdict, whether it be death or life

imprisonment, must be unanimous; it must be the verdict of each and every one of you.

* * *

COMMONWEALTH OF PENNSYLVANIA	:	In the Court of Common Pleas of Berks County,
vs.	:	Pennsylvania Criminal
DAVID ALLEN SATTAZAHN	:	No. 2194/89

TRIAL BY JURY — PENALTY PHASE
Thursday, May 9, 1991
Friday, May 10, 1991
Reading, Pennsylvania

Before THE HONORABLE SCOTT D. KELLER, Judge and a Jury.

* * *

[62] point for charge, I would ask that you instruct them on that, that it has to be beyond a reasonable doubt, the aggravating circumstances outweigh the mitigating circumstances.

THE COURT: That's not the standard. The standard for the existence and finding of an aggravating circumstance is beyond a reasonable doubt. The process that they go through is a balancing, weighing process, and a verdict of death is proper when they find that the aggravating circumstance outweighs any mitigating circumstances. All of your points are preserved, however denied. Anything else?

MR. ELDER: No.

(Whereupon the sidebar conference was concluded.)

THE COURT: One last thing before I do send you out. You'll note that there's a place for the date and a place for the foreperson to sign the verdict slip.

You may now go out and deliberate.

(Whereupon the jury retired to begin their deliberates at 10:30 p.m..)

(Whereupon the following occurred at 1:54 p.m.)

(The defendant is present.)

THE COURT: Gentlemen, we have received a communication from the foreperson indicating this jury is hopelessly deadlocked. I will bring the jury down and inquire of the foreperson and the jury whether or not any further [63] deliberations would be productive.

MR. ELDER: Your Honor, at this time I would move that the note be made an exhibit and made part of the record, and also move that under 9711(c), subparagraph 1, subparagraph Roman Numeral 5, that the jury be discharged and that you enter a sentence of life imprisonment.

THE COURT: I'm not willing to do that immediately. We'll bring the jury down. Certainly this note will be marked as an exhibit. I will inquire, make sure they are, in fact, hopelessly deadlocked.

(Note from jury — marked for identification as COURT EXHIBIT NO. 4.)

MR. ELDER: For the record, Your Honor, I would object to that inquiry.

THE COURT: All right, it's noted.

MR. ELDER: Your Honor, could you keep the jury from coming in yet?

THE COURT: For gosh sake.

(Short pause.)

THE COURT: All right.

(Jury entering the courtroom at 1:57 p.m.)

THE COURT: Mr. Foreperson, I have received your communication indicating that in your opinion the jury is hopelessly deadlocked. Is that correct?

[64] THE FOREMAN: That's correct, Your Honor.

THE COURT: Do you believe that any further deliberation by this jury would arrive at a unanimous decision on the penalty?

THE FOREMAN: No, Your Honor.

THE COURT: Is there anyone among the jury that believes that further deliberation would be productive and lead to a unanimous decision on the penalty in this case? If there is anyone please indicate at this time.

A JUROR: No.

THE COURT: You have been deliberating on this sole issue three and a half hours. It's an issue that I'm sure you honed in on very quickly. It's a very succinct issue, a distinct issue. Very well.

The Court at this time finding that you are unable to find unanimously for either sentence of death or life imprisonment will discharge you from your duties in

deliberating any further in this particular case. And because of that, as a result of your inability to unanimously decide, the Court, by virtue of the law, will at the time of formal imposition of sentence sentence this defendant to life imprisonment.

I want to formally thank, all and each and every one of you, for your service as jurors in this case. You performed

* * *

COMMONWEALTH OF PENNSYLVANIA	:	In the Court of Common Pleas of Berks County, Pennsylvania Criminal
vs.	:	
DAVID ALLEN SATTAZAHN	:	No. 2194/89

TRIAL BY JURY – PENALTY PHASE
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Before THE HONORABLE SCOTT D. KELLER,
Judge and a Jury.

* * *

[67] **COPY OF COURT EXHIBIT NO. 4.**

Your Honor –

We, the jury are hopelessly deadlocked at 9-3 for life imprisonment. Each one is deeply entrenched in their position. We do not expect anyone to change his or her position.

/s/ Joseph A. Salogar
FOREPERSON

IN THE COURT OF COMMON PLEAS OF BERKS COUNTY,

PENNSYLVANIA CRIMINAL

COMMONWEALTH OF PENNSYLVANIA

vs. **NO. 2194/89**

DAVID ALLEN SATTAZAHN

FIRST DEGREE MURDER
SENTENCING VERDICT SLIP

I. GENERAL INSTRUCTIONS

A. READ THROUGH THE ENTIRE VERDICT SLIP BEFORE BEGINNING DELIBERATIONS.

B. AGGRAVATING AND MITIGATING CIRCUMSTANCES PRESENTED TO THE JURY.

1. The following aggravating circumstance(s) (is) (are) submitted to the jury and must be proved by the Commonwealth beyond a reasonable doubt:

(1) [List and number separately]
THE DEFENDANT COMMITTED A KILLING WHILE IN THE PERPETRATION OF A FELONY

(2) _____

(3) _____

(4) _____

2. The following mitigating circumstance(s) (is) (are) submitted to the jury and must be proved by the defendant by a preponderance of the evidence:

(1) [List and number separately]
THE DEFENDANT HAS NO SIGNIFICANT HISTORY OF PRIOR CRIMINAL CONVICTIONS.

(2) THE AGE OF THE DEFENDANT AT THE TIME OF THE CRIME

(3) Any other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense.

[2] C. DO NOT COMPLETE THIS SENTENCING VERDICT SLIP UNTIL YOUR DELIBERATIONS ARE CONCLUDED. THIS SENTENCING VERDICT SLIP IS ONLY TO BE USED TO RECORD YOUR SENTENCING VERDICT AND THE FINDINGS UPON WHICH IT IS BASED.

D. IF, AFTER SUFFICIENT DELIBERATION, YOU CANNOT UNANIMOUSLY REACH A SENTENCING VERDICT, DO NOT COMPLETE OR SIGN THIS SLIP, BUT RETURN IT TO THE JUDGE. THE JUDGE WILL DETERMINE IF FURTHER DELIBERATIONS ARE REQUIRED; IF THEY ARE NOT, THE JUDGE WILL SENTENCE THE DEFENDANT TO LIFE IMPRISONMENT.

II. SENTENCING VERDICT AND FINDINGS

If you have reached a unanimous verdict, complete this part of the form.

In Section A. indicate whether the sentencing verdict is death or life imprisonment. If the sentence is death, indicate the basis for that verdict by completing Section B. If the sentence is life imprisonment, indicate the basis for that verdict by completing Section C.

A. We, the jury, unanimously sentence the defendant to (check one):

___ Death

___ Life Imprisonment

B. The findings on which the sentence of death is based are (check one):

___ 1. At least one aggravating circumstance and no mitigating circumstance.

The aggravating circumstance(s) unanimously found (is) (are):

_____

_____

_____

___ 2. One or more aggravating circumstances which outweigh(s) any mitigating circumstance(s).

The aggravating circumstance(s) unanimously found (is) (are):

_____

_____

_____

The mitigating circumstance(s) found by one or more of us (is) (are):

_____

_____

_____

C. The findings on which the sentence of life imprisonment is based are (check one):

___ 1. No aggravating circumstance exists.

___ 2. The mitigating circumstance(s) (is) (are) not outweighed by the aggravating circumstance(s).

[3] The mitigating circumstance(s) found by one or more of us (is) (are):

_____

_____

_____

_____

_____

_____

The aggravating circumstance(s) unanimously found (is) (are):

_____

_____

_____

_____ _____

Date JURY FOREPERSON

_____

Commonwealth of Pennsylvania

v.

David Allen Sattazahn
Defendant

the Court of Common Pleas
Berks County, Pennsylvania
Criminal Division

Criminal Action No.
214-89
Count No. 1 Murder
(1st Degree)

SENTENCE

AND NOW, Feb. 14, 1992, the sentence is that the defendant be committed ~~for a period of not less than ___~~ (hrs.), (days), (months), (years) nor more than ___ (days), (months), (years) to:

( ) the Berks County Prison and upon completion of his/her minimum sentence shall be released without a petition upon approval of a suitable parole plan by the Berks County Probation Office.

( ) Defendant may participate in the Earned Time Program at the Berks County Prison.

(✓) the Bureau of Corrections for confinement in a State Correctional Facility. for Life Imprisonment.

(✓) This sentence shall be effective this date

( ) This sentence shall be effective this date and will be concurrent with the sentence(s) imposed at Criminal Action No. ___

( ) This sentence shall commence at the expiration of the sentence(s) imposed at Criminal Action No. ___ and shall be consecutive to said sentence(s).

The defendant is to receive credit for 943 days served.

In addition to the above confinement, Defendant shall:

(✓) Pay the costs of prosecution.

( ) Pay a fine in the sum $_____

(✓) Pay restitution in the amount of $_____ (jointly and several) **or** as determined by the Berks County Probation Office and agreed upon by the defendant, after consultation with his/her counsel, and by the victim, or failing agreement, as ordered hereafter;

(✓) Submit to urine surveillance and other testing and participate in any treatment programs, including inpatient treatment, as directed by the ~~Berks County Probation Office and/or~~ the Pennsylvania Board of Parole, as applicable, and pay the costs thereof as directed.

( ) Because the sentence is pursuant to the Controlled Substance, Drug, Device and Cosmetic Act of Pennsylvania, all Federal Benefits are hereby denied in accordance with the provisions of Section 5301 of the Federal Anti-Drug Abuse Act of 1988, P.L. No. 100-690 for the following term of years:

Possessor:
- ( ) This being a first offense for a period of _____. (Cannot exceed one (1) year.)
- ( ) This being a second or subsequent offense for a period of _____. (Cannot exceed five (5) years.)

Trafficker:
- ( ) This being a first offense for a period of _____. (Cannot exceed five (5) years.)
- ( ) This being a second or offense for a period of _____. (Cannot exceed ten (10) years.)
- ( ) This being a third or subsequent offense for life.

The defendant shall also:

( ) Pay the sum of $_____ towards the cost of the Court Reporting Network.

( ) Attend the Alcohol Safe Driving Program and pay $_____ towards the cost of said program within 30 days upon being paroled.

( ) Pay the sum $_____to the County of Berks within _____ months towards the cost of treatment, counseling and/or supervisory control, payments to begin upon being paroled.

( ) Pay the sum $_____ to be distributed as provided for in 42 Pa. C.S. Section 3571 and Section 3573 among the Commonwealth, Berks County and/or municipality.

( ) Participate in _____ hours of Community Service as directed by the Berks County Community Service Department and pay any fees established.

( ) Undergo treatment under Vehicle Code 75 Pa. C.S. Section 1548(d) (Act 122 of 1990).

This is a case:

( ) Involving drugs with a value of more than $1,000.00.

( ) In which a motor vehicle was essentially involved.

( ) and in which the vehicle driven by the defendant was a commercial vehicle.

(✓) Other Special Conditions:

Defendant and Jeffrey Hammer shall not serve their terms of imprisonment in the same state correctional facility

Defendant shall be subject to such conditions governing parole, including a plan for payment of costs,

fine, and/or restitution as established by the Berks County Probation Office.

BY THE COURT:

/s/ Scott D. Keller J.

PENNSYLVANIA COMMISSION ON SENTENCING GUIDELINE SENTENCE FORM

See INSTRUCTIONS ON REVERSE

I. IDENTIFICATION

OFFENDER'S NAME SATTAZAHN, David A.		OFFENDER'S SEX [x] MALE [ ] FEMALE	
OFFENDER'S BIRTHDATE 1-19-62		COMMISSION IDENTIFICATION [Illegible]	
JUDGE'S NAME Keller	OFFENDER'S RACE [x] WHITE/ [ ] BLACK/ [ ] HISPANIC/ [ ] OTHER	STATE IDENTIFICATION NUMBER	
NAME OF PERSON COMPLETING FORM King	COUNTY Berks	DATE OF SENTENCE 2/14/92	DOCKET NUMBER 2194-89

II. PRIOR RECORD SCORE

MURDER	* * *
VOLUNTARY MANSLAUGHTER	* * *
RAPE	* * *
INVOL. DEVIATE SEXUAL INTER.	* * *
KIDNAPPING	* * *
ARSON (Endangering Person – Felony I)	* * *
ROBBERY (Felony I)	* * *
BURGLARY	* * *
AGGRAVATED ASSAULT	* * *
OTHER FELONY Is and FELONY IIs	* * *

FELONY DRUG OFFENSES	* * *
FELONY IIIs	* * *
WEAPON MISDEMEANORS	* * *
OTHER MISDEMEANOR CONVICTIONS __ If 2 or 3 enter 1, if 4 or more enter 2 TOTAL (cannot exceed "6") → PRIOR RECORD SCORE = [0]	

III. DUI

Convictions in previous 7 years:	____
ARDs in previous 7 yrs. (ARDs before 1/15/83 do not count):	____
TOTAL:	____

IV. GUIDELINES/SENTENCES

NAME OF OFFENSE NO. 1 Ct. #1 Murder (1st degree)		TITLE AND SECTION 2502§ A	
GRADING F1		OTN C157916-3	
OFFENSE GRAVITY SCORE NA		PRIOR REC. SCORE NA	
ENHANCEMENT – ADD APPLICABLE LENGTHS TO THE RANGES [x] NONE [ ] YOUTH [ ] SCHOOL [ ] DEADLY WEAPON = SPECIFY ____			
STANDARD RANGE	AGGRAVATED RANGE	MITIGATED RANGE	
MANDATORY SENTENCE			
SENTENCE IMPOSED: [ ] PROBATION _____ MOS [ ] COUNTY INCARCERATION MIN- _____ MOS [x] STATE INCARCERATION MAX- life impros. MOS [ ] FINE $ _____			

[x] RESTITUTION $ jtly + sev Comments: 943 t/s			
DATE OF OFFENSE 4-12-87			
GUIDELINE RANGE [ ] Standard Range [ ] Aggravated Range – Comp. Sec. V [ ] Mitigated Range – Comp. Sec. V [ ] Guideline Departure – Comp. Sec . V			
MANDATORY LAW [ ] Firearm [ ] Drug [ ] Repeat Offender [ ] Public Transportation [ ] Crimes Against Elderly [ ] Crimes Against Infants [ ] Other _____			
NAME OF OFFENSE NO. 2 Ct. #4 Robbery		TITLE AND SECTION 3701§ A 1 I	
GRADING F1	OTN C157916-3	OFFENSE GRAVITY SCORE 9	PRIOR REC. SCORE 0
ENHANCEMENT – ADD APPLICABLE LENGTHS TO THE RANGES [ ] NONE [ ] YOUTH [ ] SCHOOL [x] DEADLY WEAPON – SPECIFY hand gun			
STANDARD RANGE 48-84	AGGRAVATED RANGE 72-99	MITIGATED RANGE 39-60	
SENTENCE IMPOSED: [ ] PROBATION _____ MOS [ ] COUNTY INCARCERATION MIN- 5 yrs. ~~MOS~~ [x] STATE INCARCERATION MAX- 10 yrs ~~MOS~~ [ ] FINE $ _____ [x] RESTITUTION $ jtly + sev Comments: comm @ esp of Ctl			

DATE OF OFFENSE 4-12-87
GUIDELINE RANGE [ ] Standard Range [ ] Aggravated Range – Comp. Sec. V [ ] Mitigated Range – Comp. Sec. V [ ] Guideline Departure – Comp. Sec . V
MANDATORY LAW [ ] Firearm [ ] Drug [ ] Repeat Offender [ ] Public Transportation [ ] Crimes Against Elderly [ ] Crimes Against Infants [ ] Other _____

V. DEPARTURE/AGG/MIT REASONS

VI. REVIEW

TOTAL CONFINEMENT ____ Mos. to ____ Mos.	TYPE OF CONVICTION [ ] Bench Trial [ ] Jury Trial [ ] Non-neg. Plea [ ] Neg. Plea
JUDGE'S SIGNATURE /s/ Scott D. Keller 2-14-92 Date	

[2] INSTRUCTIONS:

There are three copies of this form. The white copy is for the Clerk's file. The yellow copy is to be sent to the Commission on Sentencing, P.O. Box 1200, State College, PA 16804. The blue copy is for the judge's file. All copies of the form must be [illegible]. Questions about the guidelines or other aspects of sentencing can be answered by the

Commission at (814) 863-2797 (or 433-2797 on the state's PANET network).

All sentences for crimes which occurred during the same transaction should be on a single form. (Use a Continuation Form (PCS-2A) when there are sentences for more than two crimes from the same transaction. See instructions on the Continuation Form.) Sentences for crimes from different transactions go on separate forms, even if those crimes are sentenced at the same time or have the same docket number. A "transaction" is a crime or crimes which were committed by a defendant at a single time or in temporally continuous actions that are part of the same episode, event, or incident, or which are conspiracy and the object offense. "Spree" crimes are not part of the same transaction unless they occurred as continuous actions not separated in time by law-abiding behavior.

Do not list on the form any summary offenses, ARDs (except those for prior DUIs), probation without verdict dispositions, or crimes which merge for purposes of sentencing.

Section I: Complete all information.

Section II: Do not complete this section when the only current conviction is for DUI. In all other cases enter all prior convictions, including the number of non-weapons misdemeanor convictions. Enter juvenile adjudications only when there is a current felony conviction and when the other conditions required by §303.7(b) are met.

Section III: Complete only when a current conviction is for DUI. Enter the number of DUI convictions and ARDs within the previous seven years. ARDs which were ordered

prior to January 15, 1993 are never counted, even if they are within a seven year period.

Section IV: When DUI is the only current conviction enter only the name of the offense and the sentence that was imposed. For all current crimes other than DUI, complete all information. Check whether the sentence was within the standard range, aggravated range, mitigated range, or whether it departs from the guidelines. In addition, indicate whether the sentence was imposed pursuant to any mandatory sentencing statute. The chief mandatory statute concern specific crimes committed: with visibly possessed firearms (42§9712); on a public transportation (42§9713; by repeat offenders (42§§9714-9715; against persons over 60 (42§9717; or against persons under 16 (42§9718). There are also mandatory minimum sentences for some drug offenses committed in certain ways (18§§6314 and 7508). On the "Comments" line indicate any special conditions of probation, work-release status, weekend incarceration, community service, etc.

Section V: List the reasons for departing from the guidelines or for using the aggravated or mitigated ranges whenever any departing, aggravating, or mitigating sentence is given. Remember to reverse both carbons when using the additional space for reasons on the back of this form.

Section VI: For all cases, enter the total cumulative minimum and maximum lengths of confinement to which the defendant is being sentenced for crimes listed on this form or on an attached Continuation Form (i.e. the actual length of time he is sentenced to serve for crimes arising from this transaction). Do not include any previously imposed sentences, or any new sentences which are being

imposed for crimes arising from a different transaction. Enter the type of conviction. The judge should sign and date the form after verifying that the information on the form is correct.

CLERK OF COURTS
Berks County, Pennsylvania

COMMITMENT AUTHORIZATION

COMMONWEALTH OF PENNSYLVANIA

vs.

David A. Sattazahn

CASE # 2194-89
OTN # C157916-3
COUNT # Murder (1)

TO THE WARDEN OF BERKS COUNTY PRISON:

I do hereby certify that the above named defendant has been officially committed by the Court **IN THE CASE SPECIFIED ABOVE**.

This commitment authorizes the keeping of this prisoner, in a manner prescribed by law, in the Berks County Prison **ON THE CASE SPECIFIED ABOVE**, until such time as an official discharge is issued in this matter.

This commitment has been authorized by the Court pursuant to the following:

[x] Sentenced for a period of LIFE to ---------- with credit of 943 days.

[x] S.C.I. or another jurisdiction.

[ ] Finding of GUILTY.

[ ] Bail forfeited.

[ ] New Bail Set: ($ ___)

[ ] Non-payment of fines or costs.

[ ] County Parole Violation/Revocation (*circle*).

[ ] Special Court Order or Bench Warrant (___)

[ ] Juvenile certified by the Court as an Adult.

In witness to the above, I have signed and officially sealed this commitment this 14 day of Feb., A.D. 1992.

/s/ S. Keller
Judge

/s/ E. Slamon
Deputy Clerk of Courts

/s/ [Illegible]
Deputy Sheriff

/s/ _____
Berks County Prison

CLERK OF COURTS
Berks County, Pennsylvania

DISCHARGE AUTHORIZATION

COMMONWEALTH OF PENNSYLVANIA

vs.

DAVID ALLEN SATTAZAHN

CHARGE MURDER (1ST DEGREE)
CASE # 2194-89
CTN # C157916-3

TO THE WARDEN OF BERKS COUNTY PRISON:

I, SHARON WINTERS, Deputy Clerk of Courts for Berks County, do hereby certify that DAVID ALLEN SATTAZAHN has been officially discharged by the Court **IN THE CASE SPECIFIED ABOVE.**

This discharge authorizes the release of this prisoner from your custody ON THE ABOVE LISTED CHARGE AND CASE NUMBER ONLY.

This discharge has been authorized by the Court pursuant to the following:

[ ] Finding of NOT GUILTY

[ ] Charges Dismissed

[ ] Discharge by special COURT ORDER: (*Specify*)

[ ] Bail posted in this Case.

[ ] County PROBATION ordered in this case.

[ ] County PAROLE or RE-PAROLE in this case.

[x] Transportation to another jurisdiction or facility: (*Specify*)

SENTENCE – LIFE IMPRISIONMENT [sic]
SCI – GRATEFORD

In witness to the above, I have signed and officially sealed this discharge this 18TH day of FEBRUARY, A.D. 1992.

/s/ Sharon Winters
Deputy Clerk of Courts

DC-300B (PART II) (Rev. 10-85) (TO BE ATTACHED TO PART I – COURT COMMITMENT) COURT COMMITMENT CONTINUATION SHEET STATE OR COUNTY CORRECTIONAL INSTITUTION	Type or Print Legibly COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF CORRECTIONS BOX 598, CAMP HILL, PA. 17011 NOTE: Additional supply of this form available at above address:

Commonwealth of Pennsylvania vs. DAVID ALLEN SATTAZAHN	
COMMITMENT NAME (LAST, FIRST, INITIAL, SUFFIX)	
COURT NUMBER #2194-89	OFFENSE TRACKING NUMBER (OTN) C 157916-3

The above defendant after [ ] pleading guilty [ ] nolo contendre [x] being found guilty was on FEB. 14, 1992 sentenced by Judge ~~District Justice~~ SCOTT D. KELLER to a term of not less than ____ ~~years~~ ____ ~~months~~ ____ ~~days nor more~~ LIFE IMPRISONMENT than ____ years ____ months ____ days, or ____ for the offense of CT #1 – MURGER [sic] – 1ST DEGREE (Section 2502(A) of the Crimes Code) or (other statute) ____.

FINE	COSTS	RESTITUTION
AMOUNT $____ To Be Paid To: [ ] COUNTY [x] COMMON-WEALTH	AMOUNT $____ To Be Paid BY: [ ] COUNTY [x] DEFENDANT	JOINT AND SEVERAL

CREDIT FOR TIME SERVED	EFFECTIVE DATE OF SENTENCE
CREDIT FOR 943 DAYS TIME SERVED.	FEB. 14, 1992

This sentence shall be deemed to run concurrent to any existing sentences, effective the date of imposition unless otherwise stipulated below:

COURT NUMBER	OFFENSE TRACKING NUMBER (OTN)
#2194-89	C 157916-3

The above defendant after [ ] pleading guilty [ ] nolo contendre [x] being found guilty was on FEB. 14, 1992 sentenced by Judge~~/District Justice~~ SCOTT D. KELLER to a term of not less than 5 years ____ months ____ days nor more than 10 years ____ months ____ days, or ____ for the offense of CT #4 – ROBBERY (Section 3701(A)(1)(I) of the Crimes Code) or (other statute) ____.

FINE	COSTS	RESTITUTION
AMOUNT $____ To Be Paid To: [ ] COUNTY [x] COMMON-WEALTH	AMOUNT $____ To Be Paid By: [ ] COUNTY [x] DEFENDANT	JOINT AND SEVERAL

CREDIT-FOR TIME SERVED	EFFECTIVE DATE OF SENTENCE
CREDIT FOR -0- DAYS TIME SERVED.	THIS SENTENCE SHALL COMMENCE AT THE EXPERATION [sic] OF THE SENTENCE IMPOSED AT CRIMINAL ACTION #2194-89 CT #1 AND BE SAID TO RUN CONSECUTIVE.

This sentence shall be deemed to run concurrent to any existing sentences, effective the date of imposition unless otherwise stipulated below:

(Seal)	In witness of the above sentence(s) for offense(s) as well as those found on the reverse side of this document, I have hereunto set my hand and seal of said court this 18TH day of FEB. 1992. AUTHORIZED SIGNATURE

CLERK OF COURTS

DATE: 2-14-92

JUDGE: S. KELLER

DEFENDANT: DAVID A. SATTAZAHN

NUMBER: 2194-89

STENO: L. SWEIGERT P.O.

CT RM: 5-A

CLERK: SLAMON

COMTH. ATTY: M. BALDWIN

DEFENSE ATTY: J. ELDER

TYPE HEARING: SENTENCE

TESTIMONY: NO

PROBATION OFFICER: P. McCAULEY

RESULTS OF HEARING: SCI-

SENTENCE: CT. 1 – LIFE – CREDIT FOR 943 DAYS SERVED.

CT. 4 – 5 to 10 YRS – SCI AT EXP. OF CT. 1

CT. 7 – 1 to 2 YRS – SCI. AT EXP. OF CT. 1

CT. 14 – 5 to 10 YRS SCI. AT EXP. OF CT. 1

CT. 15 – 1 to 2 YRS SCI AT EXP OF CT 1

COMMONWEALTH OF PENNSYLVANIA	:	**IN THE COURT OF COMMON PLEAS OF**
v.	:	**BERKS COUNTY, PENNSYLVANIA**
DAVID ALLEN SATTAZAHN	:	**CRIMINAL DIVISION**
	:	**No. 2194/89**

NOTICE OF INTENT TO SEEK THE DEATH PENALTY AND SPECIFIC AGGRAVATING FACTORS UNDER 42 Pa. C.S. §9711(d)

The Commonwealth intends to seek the Death Penalty under 42 Pa. C.S. §9711. The aggravating circumstance(s) are as follows:

_____Victim was a fireman, peace officer or public servant concerned in official detention who was killed in the performance of his duty.

_____The defendant paid or was paid by another person or had contracted to pay or be paid by another person or had conspired to pay or be paid by another person for the killing of the victim.

_____The victim was being held by the defendant for ransom or reward, or as a shield or hostage.

_____The death of the victim occurred while defendant was engaged in the hijacking of an aircraft.

_____The victim was a prosecution witness to a murder or other felony committed by the defendant and was killed for the purpose of preventing his testimony against the defendant in any grand jury or criminal proceeding involving such offenses.

__XX__ A killing committed in the perpetration of a felony.

_____ In the commission of the offense the defendant knowingly created a grave risk of death to another person in addition to the victim of the offense.

_____ Torture.

__XX__ A significant history of felony convictions involving the use or threat of violence to the person.

_____ The defendant has been convicted of another Federal or State Offense committed either before or at the time of the offense at tissue [sic] for which a sentence of life imprisonment or death was imposable or the defendant was undergoing a sentence of life imprisonment for any reason at time of the commission of the offenses.

_____ The Defendant has been convicted of another murder committed either before or at the time of the offense at issue.

_____ The defendant has been convicted of Voluntary Manslaughter as defined in **Pa. C.S. §2503**, committed either before or at the time of the offense at issue.

_____ The defendant committed the killing or was an accomplice in the killing, as defined in **18 Pa. C.S. §306(c)** (relating to liability for conduct of another complicity) while in the perpetration of a felony under the provisions of the act of

April 14, 1972 (P.L. 233, No. 64) known as the Controlled Substance, Drug, Device and Cosmetic Act, and punishable under the provisions of **18 Pa. C.S. §7508** (relating to drug trafficking sentencing and penalties).

_____ At the time of the killing, the victim was or had been involved, associated or in competition with the defendant in the sale, manufacture, distribution or delivery of any controlled substance or counterfeit controlled substance in violation of The Controlled Substance, Drug, Device and Cosmetic Act or similar law of any other state, the District of Columbia or the United States, and the defendant committed the killing or was an accomplice to the killing as defined in **18 Pa. C.S. §306(c)**, and the killing resulted from or was related to that association, involvement or competition to promote the defendant's activities in selling, manufacturing distributing or delivering controlled substances or counterfeit controlled substances.

_____ At the time of the killing, the victim was or had been a non-governmental informant or had otherwise provided any investigative, law enforcement or police agency with information concerning criminal activity and the defendant committed the killing or was an accomplice to the killing as defined in **18 Pa. C.S. §306(c)**, and the killing was in retaliation for the victim's activities as a non-governmental informant or in providing information concerning criminal activity to an investigative, law enforcement or police agency.

_____The victim was a child under twelve (12) years of age.

The Commonwealth reserves the right to add additional aggravating circumstances should facts develop justifying such additions.

Date: March 9, 1995 /s/ Mark C. Baldwin
MARK C. BALDWIN
District Attorney

CLERK OF COURTS
CERTIFICATION OF DISTRIBUTION

COMMONWEALTH OF PA. DOCKET NO. 2194/89
DATE March 9, 1995

vs.

David Allen Sattazahn

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Inmate # BT7445 Defendant – SCI Huntingdon – Drawer R. Huntingdon, PA 16652

Judge Keller

I certify I have delivered sufficient copies of the attached document and request service as set forth above.

/s/ L. Labrosky
Signature

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PROOF OF SERVICE

I, Stacey, certify that I served the within document upon the following:

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(✓) Public Defender's Office

( ) Adult Probation Office

On the 10th day of March, 1995.

(✓) Defendant by mailing a certified copy thereof to defendant at the following address:

David Sattazahn

On the 10th day of March, 1995.

( ) Defendant's attorney by mailing a certified copy thereof to:

On the ___ day of _____, 19__.

Statements in this proof of service are made subject to the penalties for unsworn falsification to authorities under the Crimes Code ss. 4904 (18 PACS, ss. 4904).

/s/ Stacey L. Lanning
Signature of Server

/s/ J. Keller

COMMONWEALTH OF PENNSYLVANIA	:	**IN THE COURT OF COMMON PLEAS OF BERKS COUNTY, PENNSYLVANIA**
VS.	:	
DAVID ALLEN SATTAZAHN	:	**CRIMINAL DIVISION**
	:	**No. 2194/89**
	:	**KELLER, J.**

Mark C. Baldwin, Esquire, District Attorney
Attorney for the Commonwealth
John Elder, Esquire, Assistant Public Defender
Attorney for the Defendant

MEMORANDUM OPINION KELLER, S.D., JUDGE

JULY 19, 1995

The Constitution of the Commonwealth of Pennsylvania does not prevent Defendant David Allen Sattazahn from choosing between his right to appeal a life sentence mandated by 42 Pa.C.S.A. § 9711(c)(2) and the remote risk of a death sentence upon retrial.

> "The criminal process, like the rest of the legal system is replete with situations requiring 'the making of difficult judgments' as to which course to follow . . . Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose."

Crampton v. Ohio, 402 U.S. 183, 91 S.Ct. 1454, 28 L.Ed.2d 711, 729 (1971), *rehearing granted and judgment vacated insofar as it leaves undisturbed the death penalty imposed,* 408 U.S. 941, 92 S.Ct. 2873, 33 L.Ed.2d 765 (1972). In addition, the Commonwealth may seek an additional aggravating circumstance upon retrial which was not sought in the original trial.

PROCEDURAL HISTORY

On May 9, 1991, Defendant was found guilty by a jury of [2] Murder of the First Degree, Murder of the Second Degree, Murder of the Third Degree, Robbery, Aggravated Assault (Serious Bodily Injury), Aggravated Assault (Deadly Weapon), Possessing Instruments of Crime, Conspiracy, and Firearms Not to Be Carried Without a License.[1] During the penalty phase of this capital case, the jury deadlocked and the Court sentenced Defendant to life imprisonment as required by 42 Pa.C.S.A. §9711(c)(2). On March 12, 1992, Defendant appealed from this Court's Judgment of Sentence. By opinion dated July 30, 1993, the Superior Court of Pennsylvania reversed Defendant's convictions and remanded for a new trial. The Supreme Court of Pennsylvania granted allocatur but then dismissed the appeal as improvidently granted.

On March 9, 1995, after jurisdiction of the case returned to this Court, the Commonwealth filed a Notice of Intent to Seek the Death Penalty and Specific Aggravating Circumstances Under 42 Pa.C.S.A. §9711(d). In its Notice, the Commonwealth added the additional aggravating circumstance of "[a] significant history of felony convictions involving the use or threat of violence to the person." 42 Pa.C.S.A. §9711(d)(9)(Supp. 1995). The addition stems from guilty pleas Defendant entered in Berks

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[1] 18 Pa.C.S.A. §2502(a),(b),(c); 18 Pa.C.S.A. §13701(a)(1)(i); 18 Pa.C.S.A. §2702(a)(1),(4); 18 Pa.C.S.A. §1907(a); 18 Pa.C.S.A. §903; 18 Pa.C.S.A. §6106(a).

County in September of 1991, in Schuykill County in March of 1992, and in Lebanon County in April of 1992. On March 13, 1995, Defendant filed a Motion to Prevent the Commonwealth from Seeking the Death Penalty in Defendant's Retrial. After hearing held and the [3] submission of written briefs, this Court denied Defendant's Motion to Prevent the Commonwealth from Seeking the Death Penalty in Defendants Retrial, as well as Defendant's Motion to Prevent the Commonwealth from Adding an Additional Factor Under 42 Pa.C.S.A. §9711(d). On June 26, 1995, Defendant filed a Notice of Appeal from this Court's Order denying his motions.

This opinion is written pursuant to Pa.R.A.P. 1925(a) and, for the following reasons, we disagree with Defendant's complaints and request that his appeal from this Court's Order dated May 31, 1995 be denied.

I. AVAILABILITY OF THE DEATH PENALTY UPON RETRIAL

In his first matter complained of on appeal, Defendant alleges that this Court erred in failing to grant his Motion to Prevent the Commonwealth from Seeking the Death Penalty Upon Retrial. Defendant incorporates his motion by reference to support his complaint. This Court properly denied Defendant's Motion and his allegations to the contrary are without merit.

A. DOUBLE JEOPARDY AND PENNSYLVANIA'S RIGHT OF APPEAL

Among the numerous complaints he raises on appeal, Defendant presents one issue of first impression in this Commonwealth. Defendant contends that Article I, Section 10 of the Pennsylvania Constitution, the double jeopardy

section, interpreted in conjunction with Article V, Section 9, the right of appeal section, precludes the Commonwealth from seeking the death penalty upon retrial of a defendant previously sentenced to life [4] imprisonment pursuant to 42 Pa.C.S.A. §9711(c)(2). We disagree.

Defendant argues that an interpretation of the Pennsylvania double jeopardy section which allows the imposition of a death sentence after a life sentence creates an "irreconcilable conflict" with his constitutionally guaranteed right of appeal. Defendant claims that an interpretation of the double jeopardy section in conjunction with the right of appeal section distinguishes Pennsylvania's double jeopardy section from the federal double jeopardy clause, thereby distinguishing his case from *Commonwealth v. Martorano*, 535 Pa. 178, 634 A.2d 1063 (1993) *(federal double jeopardy did not preclude prosecution from seeking death penalty on retrial of defendant where jury had been unable to reach agreement on penalty in first trial, with the result that the court had been required to impose sentence of life imprisonment)*. Specifically, Defendant alleges that permitting a death sentence after a life sentence violates the Pennsylvania double jeopardy prohibition because it impermissibly chills his constitutionally guaranteed right of appeal.

In support of his claim, Defendant relies primarily upon foreign authority. *See State v. Washington*, 380 So.2d 64 (La. 1980); *State v. Wolf*, 216 A.2d 586 (N.J. 1966); and *People v. Henderson*, 386 P.2d 677 (Cal. 1963). We find this non-binding precedent instructive but ultimately unpersuasive as to interpreting provisions of the Pennsylvania Constitution.

Like its federal counterpart, the Pennsylvania double jeopardy prohibition does not preclude the Commonwealth from [5] seeking the death penalty upon Defendant's retrial following a statutorily mandated life sentence. A defendant may be required to choose between the possibility of a death sentence upon retrial and exercising his right to appeal a sentence of life imprisonment. As Justice Benjamin N. Cardozo wrote, "[t]here are dangers in any choice." *People v. Defore*, 242 N.Y. 13, 25, 150 N.E. 585, 589 (1926). Article I, Section 10 of the Pennsylvania Constitution does not forbid defendants from making difficult decisions based solely upon the risks, however remote, attendant to those decisions. The Supreme Court of Pennsylvania has previously expressed its support of this interpretation.

In *Commonwealth v. Martorano*, the Supreme Court clearly expressed support for an interpretation of Pennsylvania's double jeopardy section which follows the interpretation of the federal double jeopardy clause. In reaching its decision, the Court concluded that a jury's failure to reach a unanimous agreement as to the sentence to be imposed in a capital case is not a verdict and does not result in an acquittal on the merits of the death penalty. *Martorano*, 634 A.2d at p. 1073. Accordingly, the Supreme Court of Pennsylvania, in solely reviewing federal double jeopardy principles, then held that "a default judgment does not trigger a double jeopardy bar to the death penalty upon retrial." *Id. at* p. 1070. After finding that arguments on the Pennsylvania double jeopardy section were not properly raised in *Martorano*, the Court nevertheless stated that "**[w]e believe that the federal approach to this issue is a sound one.**" *Id.* at p. [6] 1071 (Emphasis added). The right of appeal guaranteed by Article V, Section 9 of the

Pennsylvania Constitution does not undermine the wisdom of this approach.

Requiring defendants to accept certain risks in order to exercise their right of appeal is not a novel concept. Under Pennsylvania law prior to *Martorano* and the trial in the instant case, defendants who appealed their judgments of sentence "accept[ed] the risk that the Commonwealth may seek a remand for resentencing thereon if the disposition in the appellate court upsets the original sentencing scheme of the trial court." *Commonwealth v. Goldhammer,* 512 Pa. 587, 517 A.2d 1280, 1283 (1986), *U.S. cert. denied,* 480 U.S. 950, 107 S.Ct. 1613, 94 L.Ed.2d 798 (1987). Although *Goldhammer* did not deal with the possibility of a death sentence after a life sentence, it clearly held that the right of appeal in Pennsylvania is not entirely free "of all the attending repercussions," including those which are adverse to the defendant. *Id.*, 517 A.2d at p. 1283. Potentially adverse repercussions may warrant caution in a defendant's decision to appeal, but they do not unconstitutionally chill the right of appeal.

Defendant's "chill" argument is weakened further by the fact that he was not chilled in the exercise of his own appellate rights in the instant case. At the time Defendant appealed, the question of whether the death penalty could be sought upon retrial, where the first trial resulted in a statutorily mandated life sentence, remained unsettled as a matter of law. In spite [7] of this uncertainty, Defendant exercised his right to appeal. Defendant's decision to appeal demonstrates the flaw in his "chill" argument because he was not in fact chilled. Further, we agree with the United States Supreme Court in that "we doubt that the 'chill factor' will often be a deterrent of any significance . . . the likelihood of actually receiving a harsher

sentence is quite remote at the time a convicted defendant begins to weigh the question whether he will appeal." *Chaffin v. Stynchcombe,* 412 U.S. 17, 93 S.Ct. 1977, 36 L.Ed.2d 714, 727 (1973). At the time a defendant decides whether he will appeal, a death sentence is merely speculative. Before a death sentence becomes reality, a host of contingencies must occur: the appeal must succeed, relief must be in the form of a remand rather than a dismissal, the prosecution must elect to retry the case and seek the death penalty, the defendant must refuse to plea bargain and opt for a trial, the defendant must be convicted, and the sentence imposed must be death rather than life imprisonment. "[W]e cannot agree that such speculative prospects interfere with the right to make a free choice whether to appeal." *Id.*, 36 L.Ed.2d at p. 728. Nor can we agree that such a choice is barred by Pennsylvania's double jeopardy section. "[T]he law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree." *Nash v. U.S.,* 229 U.S. 373, 377, 33 S.Ct. 780, 57 L.Ed. 1232, 1235 (1913) *(Justice Oliver Wendell Holmes).* The Pennsylvania Constitution does not offer a defendant blanket [8] protection from difficult decisions.

In the instant case, Defendant elected to exercise his constitutional right in Pennsylvania to appeal. By necessity, an appeal involves a challenge to that which is already decided for some indeterminate form of relief. "Appeal, v.t. in law, to put the dice in the box for another throw." Bierce, Ambrose, *The Devil's Dictionary* (Garden City, NY: Doubleday and Company, Inc.), p. 17. Article V, Section 9 of the Pennsylvania Constitution guarantees a defendant "another throw" of the dice. However, there is no guarantee of a risk-free throw. Defendant's right of

appeal does not sufficiently distinguish double jeopardy in Pennsylvania from the federal double jeopardy clause so as to render the Pennsylvania Supreme Court's discussion in *Martorano, supra*, unsound. Accordingly, Article I, Section 10 of the Pennsylvania Constitution does not preclude the Commonwealth from seeking the death penalty upon Defendant's retrial.

B. ADDITIONAL ALLEGATIONS OF ERROR

Of his remaining complaints on appeal concerning the availability of the death penalty, Defendant fails to raise any issues of merit or first impression. First, Defendant alleges that the Commonwealth's seeking the death penalty violates the Due Process and Equal Protection clauses of the United States Constitution. The Supreme Court of Pennsylvania has held that federal principles of due process and equal protection do not preclude imposition of the death penalty upon reconviction following a retrial. *Martorano,* 634 A.2d at p. 1071-1072. [9] Therefore, Defendant's first complaints are entirely without merit. Defendant's further contention that the Commonwealth's seeking the death penalty violates the Due Process and Equal Protection sections of the Pennsylvania Constitution is likewise without merit. The Pennsylvania Constitution provides no greater due process or equal protection rights in this situation than its federal counterpart. *Commonwealth v. Clutter*, 419 Pa.Super. 275, 615 A.2d 362, 366 (1992), *allocatur denied,* ___ Pa. ___, 633 A.2d 149 (1993); *Dansby v. Thomas Jefferson University Hospital*, 424 Pa.Super. 549, 623 A.2d 816, 820 (1993), *allocatur denied,* ___Pa. ___, 651 A.2d 538 (1994). Accordingly, Defendant's due process and equal protection arguments,

based upon either the federal or state constitution, do not allege a basis for relief.

Next, Defendant argues that, under the circumstances, the Commonwealth's seeking the death penalty constitutes cruel and unusual punishment under the Eighth Amendment of the United States Constitution. The death penalty does not, under all circumstances, constitute cruel and unusual punishment in violation of the Eighth Amendment. *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), *rehearing denied,* 429 U.S. 875, 97 S.Ct. 197, 50 L.Ed.2d 158 (1976). Defendant has not alleged any facts, nor do we find any facts in the instant circumstances, which would render the availability of the death penalty upon retrial cruel and unusual.

Third, Defendant alleges that the Commonwealth's seeking the death penalty violates his right of appeal pursuant to Article V, [10] Section 9 of the Pennsylvania Constitution. However, Defendant appealed his prior conviction in the instant case. Defendant's appeal to the Superior Court was successful, granting him relief in the form of a retrial. Defendant was afforded his right to appeal and he fully exercised that right. Clearly, his right of appeal has not been violated in any way.

Defendant complains further that 18 Pa.C.S.A. §109 prevents the Commonwealth from seeking the death penalty in his retrial. However, the Supreme Court of Pennsylvania has stated, "[t]his argument presents nothing novel; in substance, it is really nothing more than respondents' double jeopardy argument. We have already fully reviewed that argument and found it to be meritless." *Martorano,* 634 A.2d at p. 1073. Likewise, we find Defendant's complaint to be meritless.

Fifth, Defendant complains that the Pennsylvania Supreme Court's decision in *Martorano, supra*, as applied to his case, operates as an *ex post facto* law in violation of Article I, Section 10 of the United States Constitution and Article I, Section 17 of the Pennsylvania Constitution. Defendant's complaint is entirely without merit. First, the *ex post facto* prohibition in both constitutions refers to the passage of laws, i.e. legislative enactments, rather than judicial interpretations of law. Second, even if the *ex post facto* prohibition does apply to judicial decisions, the *Martorano* decision operates only as a procedural change in the law and did not effect an increase in the potential sentence for the charge of Murder of the First [11] Degree. Such a procedural change is not an unconstitutional *ex post facto* application of law. *Commonwealth v. Marshall*, 537 Pa. 336, 643 A.2d 1070, 1073 (1994); *Commonwealth v. Young,* 536 Pa. 57, 637 A.2d 1313 (1993). Accordingly, Defendant's ex post facto arguments do not afford him a basis for relief.

Defendant also raises a number of challenges to the *Martorano* decision itself. Specifically, Defendant complains that (1) the *Martorano* court's treatment of 42 Pa.C.S.A. §9711 violates the United States and Pennsylvania Constitutions, (2) that the retroactive application of *Martorano* violates the United States and Pennsylvania Constitutions, (3) that he would be prejudiced by the retroactive application of *Martorano* because he did not knowingly and intelligently agree to the discharge of the jury during the penalty phase, and (4) that he would be prejudiced by the retroactive application of *Martorano* because he did not knowingly and intelligently waive his right to appeal the sufficiency of the evidence during the penalty phase. We cannot conclude that the decision of the

Pennsylvania Supreme Court in *Martorano,* or its treatment of 42 Pa.C.S.A. §9711; is unconstitutional. Moreover, we find no merit in any of Defendant's arguments concerning retroactivity. The *Martorano* decision did not create a new rule of law. Rather, the Pennsylvania Supreme Court's decision in *Martorano* was merely a declaration of the current state of the law. As such, the application of *Martorano* to Defendant's case is not a retroactive application of law. Defendant's specific complaints concerning [12] the *Martorano* decision are wholly without merit.

In his first matter complained of on appeal, Defendant fails to raise any grounds for relief which would preclude the Commonwealth from seeking the death penalty upon retrial.

II. ADDITIONAL AGGRAVATING CIRCUMSTANCES UPON RETRIAL

Defendant also charges that the Commonwealth should not be allowed to add an aggravating circumstance upon retrial which was not sought during the original trial. Defendant complains that adding an aggravating circumstance would violate his rights and that no authority exists for such an addition. Again, we disagree.

As previously discussed, permitting the Commonwealth to seek the death penalty upon Defendant's retrial does not impermissibly burden his rights under the Pennsylvania or United States Constitution. For the very same reasons, permitting the Commonwealth to add a new aggravating circumstance also does not impermissibly burden Defendant's constitutional rights. Accordingly, Defendant's constitutional claims for relief are without merit.

Defendant's contention that no authority exists for the addition of an aggravating circumstance upon retrial is likewise meritless. The Commonwealth may introduce a new aggravating circumstance in the penalty phase of a second capital murder trial without providing an excuse for not having presented that factor in the first trial. *Commonwealth v. Zook*, 532 Pa. 79, 615 [13] A.2d 1, 19-21, (1992), *U.S. cert. denied,* 113 S.Ct. 1420, ___ U.S., ___ 122 L.Ed,2d 789 (1993). *Zook*, *supra,* differs from the instant case only in that the original jury sentenced the defendant to death at the conclusion of the first trial. In *Zook* and in the instant case, the Commonwealth was forced to retry the defendant in both guilt and, assuming a guilty verdict upon Defendant's retrial for purposes of discussion, penalty phases. In each instance, the Commonwealth sought to add one or more aggravating circumstances upon retrial which were not sought in the original trial. In *Zook*, the Supreme Court of Pennsylvania held that the Commonwealth could add a new aggravating circumstance in the retrial. Clearly, in light of *Martorano*, *supra,* and our findings herein, the holding in *Zook* applies to the instant case in spite of the different penalties imposed in the first trials. The fresh start brought about by a successful appeal renders the two cases, at the retrial stage, indistinguishable.

Further support for application of the *Zook* holding may be found in the comment to Pa.R.Cr.P. 352. The comment states that in a redetermination of sentencing, which is functionally equivalent to the penalty phase following a guilty verdict upon retrial, "the attorney for the Commonwealth may not introduce any new aggravating circumstance except where there has been an intervening conviction for an offense committed prior to the

present conviction which would constitute an aggravating circumstance." At this point, Defendant has not been convicted [14] in the instant case. Therefore, Defendant's guilty pleas following the first verdict in the instant case, which may constitute the new aggravating circumstance of a significant history of felony convictions which involve the threat of violence to the person, are intervening convictions for offenses committed prior to any conviction in the instant case. The comment to Pa.R.Cr.P. 352 clearly weighs in favor of permitting the Commonwealth to introduce a new aggravating circumstance in this circumstance.

Although Defendant alleges that permitting the Commonwealth to add a new aggravating circumstance upon retrial violates his constitutional rights in the absence of statutory authority, his claim is meritless. Defendant's rights are not impermissibly burdened by such an addition. Further, *Zook*, *supra*, and the comment to Pa.R.Cr.P. 352 offer ample authority for adding a new aggravating circumstance upon retrial, particularly in light of *Martorano*, *supra*, and our own findings herein. The Commonwealth may seek a new aggravating circumstance upon retrial.

CONCLUSION

Upon being sentenced to life imprisonment, Defendant chose to exercise his right of appeal. Defendant prevailed on appeal and won a new trial, a fresh start. However, because Defendant was not acquitted of death in his first trial, the Commonwealth is entitled to a fresh start in seeking the death penalty upon retrial. Fairness dictates,

and the Constitutions of [15] Pennsylvania and the United States do not prohibit, a fresh start upon retrial for all concerned. "The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true." *Snyder v. Massachusetts*, 291 U.S. 97, 122, 54 S.Ct. 330, 78 L.Ed. 674, 687 (1934) (*Justice Benjamin N. Cardozo*). Defendant successfully appealed for a new trial. To keep the balance true, the United States and Pennsylvania Constitutions permit the Commonwealth to seek the death penalty and add a new aggravating circumstance upon retrial. Defendant's decision to appeal under these circumstances, while difficult, is certainly not unconstitutional in the Commonwealth of Pennsylvania.

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DATE July 19, 1995

vs.

David Allen Sattazahn

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_____ [ ] Berks County Prison

3 [X] ~~Name and Address of Probation and/or Parole Officer~~

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Signature

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James P. Troutman, *Clerk of Courts*
Faith I. Phillips, *Chief Deputy*
Daryl F. Moyer, *Solicitor*

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( ) District Justice _____
( ) Police Department _____

On the 20 day of July, 1995.

( ) Defendant and/or Claimant by mailing a certified copy thereof to the following address:

_____

_____

on the ___ day of _____, 19_

( ) Defendant's attorney by mailing a certified copy thereof to:

_____

_____

on the ___ day of _____, 19__.

Statements in this proof of service are made subject to the penalties for unsworn falsification to authorities under the Crimes Code § 4904 (18 PACS § 4904).

/s/ Patty Roach
Signature of Server

_____

J. A08015/96

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
DAVID ALLEN SATTAZAHN, Appellant	:	No. 02274 Philadelphia 1995

Appeal from the Order Entered May 31, 1995, in the Court of Common Pleas of Berks County, Criminal, No. 2194/89

BEFORE: McEWEN, P.J., TAMILIA, and BROSKY, JJ.

JUDGMENT

***ON CONSIDERATION WHEREOF**, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of* BERKS *County be, and the same is hereby* AFFIRMED.

BY THE COURT:

/s/ David A. Szewczak
PROTHONOTARY

Dated: APRIL 18, 1996

J. A08015/96

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
DAVID ALLEN SATTAZAHN, Appellant	:	No. 02274 Philadelphia 1995

Appeal from the Order Entered May 31, 1995, in the Court of Common Pleas of Berks County, Criminal, No. 2194/89

(Filed April 18, 1996)

BEFORE: McEWEN, P.J., TAMILIA, and BROSKY, JJ.

MEMORANDUM:

Appellant, David Allen Sattazahn, appeals from the order of the trial court which denied the motion of appellant which sought to prevent the Commonwealth from seeking the death penalty or arguing the existence of an additional aggravating circumstance upon the retrial of appellant. We find the arguments presented by appellant are without merit and, therefore, affirm.

Appellant in the brief he has submitted to this Court presents the following claims:

> The Pennsylvania constitutional prohibition against double jeopardy, the appellant's Pennsylvania constitutional rights of appeal, due process, and equal protection, prohibit the Commonwealth from seeking the death penalty in the appellant's retrial.
>
> The United States constitutional prohibition against double jeopardy, and the United States

constitutional rights of due process and equal protection, prohibit the Commonwealth from seeking the death penalty in the appellant's retrial.

The Commonwealth should be precluded from adding an additional aggravating factor under 42 Pa.C.S. § 9711(d).

[2] The distinguished Judge Scott D. Keller has ably encapsulated the facts underlying this appeal:

> On May 9, 1991, defendant was found guilty by a jury of murder of the first degree, murder of the second degree, murder of the third degree, robbery, aggravated assault (serious bodily injury), aggravated assault (deadly weapon), possessing instruments of crime, conspiracy, and firearms not to be carried without a license. During the penalty phase of this capital case, the jury deadlocked and the court sentenced defendant to life imprisonment as required by 42 Pa.C.S. § 9711(c)(2). On March 12, 1992, defendant appealed from this court's judgment of sentence. By opinion dated July 30, 1993, the Superior Court of Pennsylvania reversed defendant's convictions and remanded for a new trial. The Supreme Court of Pennsylvania granted allocatur but then dismissed the appeal as improvidently granted.
>
> On March 9, 1995, after jurisdiction of the case returned to this court, the Commonwealth filed a notice of intent to seek the death penalty and specific aggravating circumstances under 42 Pa. C.S. § 9711(d). In its notice, the Commonwealth added the additional aggravating circumstance of "[a] significant history of felony convictions involving the use or threat of violence to the person." 42 Pa.C.S. § 9711(d) (9) (Supp. 1995). The

> addition stems from guilty pleas defendant entered in Berks County in September of 1991, in Schuylkill County in March of 1992, and in Lebanon County in April of 1992. On March 13, 1995, defendant filed a motion to prevent the Commonwealth from seeking the death penalty in defendant's retrial. After hearing held and the submission of written briefs, this court denied defendant's motion to prevent the Commonwealth from seeking the death penalty in defendant's retrial, as well as defendant's motion to prevent the Commonwealth from adding an additional factor under 42 Pa.C.S. § 9711(d). On June 26, 1995, defendant filed a notice of appeal from this court's order denying his motions.

Appellant first contends that the Commonwealth should not be permitted to seek the death penalty on retrial since the jury did not vote to impose the death penalty during the penalty phase of the first trial of appellant. Appellant [3] argues that this result is compelled by the tension between two provisions of the Pennsylvania Constitution, namely, the double jeopardy protection[1] and the right to appeal.[2] Appellant frames the tension between the two provisions thusly:

> [Appellant] after originally receiving a life sentence and successfully overturning his conviction could not again face the death penalty. . . . The effect . . . is to create a whole class of people frightened from exercising their Pennsylvania constitutional right to appeal for fear of receiving in the future the harshest of sentences, the death

---

[1] Pennsylvania Constitution Article I, Section 10.

[2] Pennsylvania Constitution Article V, section 9.

penalty, if successful in his or her appeal and unsuccessful in the retrial.

To interpret the Pennsylvania double jeopardy clause so as to allow a death sentence after a life sentence would create an irreconcilable conflict with the defendant's right of appeal under the Pennsylvania Constitution.... In order to give full effect to the Pennsylvania right of appeal, the Pennsylvania double jeopardy clause must be interpreted so as to preclude the possibility of a death sentence being imposed after a life sentence has been imposed.

What good is the Pennsylvania constitutional right of appeal, if exercising that right after receiving a life sentence, and winning the appeal, subjects a defendant to the death penalty upon retrial?

We are constrained to summarily reject the rationale of appellant based on the reasoning of our Supreme Court in *Commonwealth v. Martorano,* 535 Pa. 178, 634 A.2d 1063 (1993). As the *Martorano* Court noted, the analysis which it applied under the Federal Constitution is equally compelling when [4] applied under the Pennsylvania Constitution.[3] Double jeopardy protection does not attach under either constitutional analysis because of the particular attributes of the Pennsylvania procedure for determining when the death penalty shall be imposed. This is so even where the first trial culminated in a guilty verdict, but the jury did not impose a death sentence:

---

[3] Appellant presents in his second claim the precise issue decided in *Martorano, supra,* and, even were we persuaded of the merit of the claim – which we are not – , we would, of course, be bound by the decision of our Supreme Court.

> What respondents fail to apprehend is the significance of the absence of decision in the instant case. Here, unlike the sentencer in *Bullington* or other cases just discussed, the jury did not make a decision on the merits regarding an appropriate penalty. It did not find that the state had. failed to prove its case. It made no findings about the existence of any aggravating or mitigating circumstances. It was deadlocked. Since it made no decision, there could not in fact be any "acquittal on the merits." Nor did the imposition of a life sentence by the trial judge operate as an acquittal. Under Pennsylvania's sentencing scheme, the judge has no discretion to fashion sentence once he finds that the jury is deadlocked. The statute directs him to enter a life sentence. 42 Pa.C.S. § 9711(c)(1)(v) (. . . if . . . further deliberation will not result in a unanimous agreement as to the sentence, . . . the court *shall* sentence the defendant to life imprisonment.) (emphasis added). The judge makes no findings and resolves no factual matter. Since judgment is not based on findings which resolve some factual matter, it is not sufficient to establish legal entitlement to a life sentence. A default judgment does not trigger a double jeopardy bar to the death penalty upon retrial.

Commonwealth v. Martorano, supra at ___, 634 A.2d at 1070.

Contrary to the argument of appellant, this result is unaffected by the right to appeal guaranteed under the [5] Pennsylvania Constitution, Article V, section 9, because, upon winning a new trial on appeal, the retrial of appellant is on a "clean slate". *Commonwealth v. Martorano, supra* at ___, 634 A.2d at 1070; *Commonwealth v. Oakes,* 481 Pa. 343, ___, 392 A.2d 1324, 1326-27 (1978); *Smith v.*

Board of Probation & Parole, 161 Pa.Cmwlth. 173, ___, 636 A.2d 291, 292 (1994). Appellant is not, simply by securing the benefit of a new trial, to be afforded, as well, the luxury of avoiding all risk averted during the first trial, but inherent in the trial process. For example, on retrial, the court will make entirely new rulings on the admission of "evidence, points for charge and other matters which arise in the course of a trial." *Commonwealth v. Oakes, supra* at ___, 392 A.2d at 1327. Appellant also runs the risk at a second trial that the Commonwealth may pursue a different, perhaps more effective, trial strategy. *Commonwealth v. Chapman,* 255 Pa.Super. 265, ___, 386 A.2d 994, 1004 (1978). Similarly, however, appellant, too has the opportunity to pursue a different, more effective trial strategy and is entitled to a second appeal to this Court should he be convicted at his second trial. *Commonwealth v. Oakes, supra* at ___, 392 A.2d at 1327 (fresh appellate rights following second trial); *Commonwealth v. Chapman, supra* at ___, 386 A.2d at 1004 (defendant may alter approach to second trial). This "clean slate" rule, while it may entail a degree of risk for appellant, provides "a further opportunity 'in obtaining a fair readjudication of his guilt free from error' and at the same time accommodate[s] society's 'valid concern for insuring that the guilty are punished.'" *Commonwealth v. Vogel,* 501 Pa. 314, ___, 461 A.2d 604, 611 (1983), *cert. denied,* 465 U.S. 1104, 80 L.Ed.2d 133, 104 S.Ct. 1603 (1984), *quoting Burks v. United States,* 437 U.S. 1, 15, 98 S.Ct. 2141, 2149, 57 L.Ed.2d 1, 12 (1978). Since neither principles of double jeopardy nor the right to appeal guaranteed by the Pennsylvania Constitution bars the Commonwealth from again seeking the death penalty at the second trial, the first claim of appellant must be rejected as meritless.

Appellant next asserts that the Commonwealth should not be allowed to use, as an aggravating factor under 42 Pa.C.S. § 9711(d), convictions upon which sentence was imposed after his first trial where the criminal conduct occurred prior to May 9, 1991. The Commonwealth seeks to argue on retrial that appellant has a significant history of felony convictions involving the use or threat of violence to the person, 42 Pa.C.S. § 9711(d)(9), based on the following intervening crimes of appellant:

September 19, 1991	Appellant pleads guilty to five counts of burglary and one count of robbery in Berks County.
March 17, 1992	Appellant pleads guilty to third degree murder in Schuylkill County.
April 1, 1992	Appellant pleads guilty to burglary in Lebanon County.

[7] Appellant argues that principles of double jeopardy and the following comment to Pa.R.Crim.P. 352, which governs notice of aggravating circumstances, prohibit the introduction of the instant aggravating circumstance:

> If the trial court orders a new sentencing hearing, or the Supreme Court remands a case for a redetermination of penalty pursuant to 42 Pa.C.S. § 9711(h)(4) (Supp. 1990), the attorney for the Commonwealth may not introduce any new aggravating circumstance except when there has been an intervening conviction for an offense committed prior to the present conviction which would constitute an aggravating circumstance.

Pa.R.Crim.P. 352, comment.

We disagree with the rationale offered by appellant since our Supreme Court, in *Commonwealth v. Zook*, 532 Pa. 79, ___, 615 A.2d 1, 19-21 (1992), *cert. denied*, 507 U.S. 974, 113 S.Ct. 1420, 122 L.Ed.2d 789, (1993), held that principles of double jeopardy are inapplicable where the Commonwealth seeks to introduce additional aggravating factors at a subsequent trial. *Accord*: *Poland v. Arizona*, 476 U.S. 147, 155-56, 106 S.Ct. 1749, 1755, 90 L.Ed.2d 123 (1986). Moreover, appellant's reliance on the comment to Rule 352 is misplaced. The comment provides that where, as here, there has been an intervening conviction, *i.e.*, a conviction occurring after the initial sentencing, but prior to resentencing, that intervening conviction may be introduced during the penalty phase. Accordingly, the trial court properly concluded that the Commonwealth may introduce additional aggravating circumstances during the penalty phase of the second trial.

[8] Order affirmed.

BROSKY, J., FILES A DISSENTING MEMORANDUM.

DISSENTING MEMORANDUM BY BROSKY, J.

I dissent. I disagree with the majority that *Commonwealth v. Martorano*, 535 Pa. 178, 634 A.2d 1063 (1993), controls our decision in the present case. Our Supreme Court, while examining a similar factual scenario, did not consider the same argument advanced here. More specifically, *Martorano* did not address the interplay of the constitutional right to appeal.

It would seem obvious that one's decision to appeal a conviction would be impacted by the possibility that a

death sentence could be handed down after a second trial even though it was not the result of the first trial. As such, the position of the majority would have a chilling effect upon the right to appeal. These considerations were not addressed in either *Martorano* or *Poland v. Arizona*, 476 U.S. 147, 106 S.Ct. 1749 (1986), upon which our Supreme Court relied in *Martorano*.

Appellant cites to numerous cases of our sister states that have denied the state from seeking a death sentence on a [2] retrial. See, e.g. *People v. Henderson*, 386 P.2d 677 (Ca., 1963) and *New Jersey v. Wolf*, 46 N.J. 301, 216 A.2d 586 (1966). The Commonwealth argues that these cases are distinguishable in that many of them involve scenarios where the imposition of a life sentence was essentially the result of a finding that it is an appropriate sentence rather than as a result of an inability to prove appropriateness of a death sentence. Such a distinction may impact the double jeopardy analysis as such a finding is considered a verdict. However, the distinction is relatively meaningless as it relates to the right to appeal. If one is subjected to a death sentence upon retrial it will impact the decision to appeal regardless of whether or not the double jeopardy clause permits it. These same decisions, although distinguishable as to the double jeopardy analysis, speak eloquently and forcefully about the chilling effect of allowing a death penalty upon retrial. Until our Supreme Court holds to the contrary, I believe we should follow the example of our sister states.

COMMONWEALTH
OF PENNSYLVANIA

vs.

DAVID ALLEN
SATTAZAHN

In the Court of Common Pleas of Berks County, Pennsylvania Criminal

No. 2194/89

IN CAMERA PRETRIAL HEARING
Tuesday, December 29, 1998
Reading, Pennsylvania

Before THE HONORABLE SCOTT D. KELLER,
President Judge

APPEARANCES:

For the Commonwealth:

MARK C. BALDWIN, ESQUIRE
District Attorney
County of Berks
Fifth Floor, Services Center
633 Court Street
Reading, Pennsylvania 19601

For the Defendant:

JOHN T. ADAMS, ESQUIRE
1720 Mineral Spring Road
Reading, Pennsylvania 19603

* * *

[3] Adams, due to the significant length of time between the original trial which was in 1991 and today's date, I see no reason to change venue or venire. However, I will make an official ruling on this after we see how voir dire goes.

MR. ADAMS: That's actually – I have no problem with that resolution to that issue.

THE COURT: All right. So we'll defer an official ruling on – I'm not granting it at this point obviously.

Count No. 3, I'm really not sure exactly what you want me to do here.

MR. ADAMS: Well, Your Honor, I'm not asking really for this Court – I am – as the Court is well aware, I was not involved in this case prior to October of 1998. It appears from my review of the case that the Pennsylvania Supreme Court has not reviewed what I consider an extremely important issue. They did not grant an allowanceof appeal in this case. What I am specifically stating is that we continue to object. And, for the record, we want to make it clear on the record that we will continue to object to the Commonwealth seeking the death penalty. And, specifically, – and also we specifically object to the Commonwealth adding additional aggravating factors with the new trial. I am just requesting that my objection be noted for the record in order that it can be preserved for potential appellate review.

[4] THE COURT: Well, your objection is noted. The Superior Court has ruled. And by denying allowance of appeal, the Supreme Court has ruled affirming the judgment of the Superior Court confirming me when I allowed the Commonwealth to seek the death penalty at this trial and also to add an additional aggravating circumstance. So your objection is noted. I don't think I really need to do anything more with regard to Count No. 3.

That takes care of your motions.

Now, before we actually get into the pretrial conference, I again put together proposed opening remarks and voir dire.

(Whereupon, documents submitted to Counsel.)

THE COURT: We'll go off the record, allowing you an opportunity to just peruse it a little bit.

(Whereupon, discussion off the record.)

THE COURT: We're now going to hold a pretrial conference under Rule 311.

Mr. Adams, is it all right with you that we conduct this in the retiring room?

MR. ADAMS: Absolutely.

THE COURT: All right. Number 1 under the rule is pretrial discovery. I think we've already addressed that. And at present, there don't appear to be any problems that need judicial intervention.

* * *

ORIGINAL

IN THE COURT OF COMMON PLEAS OF BERKS COUNTY,

PENNSYLVANIA CRIMINAL

COMMONWEALTH OF PENNSYLVANIA **NO. 2194/89**

vs.

DAVID ALLEN SATTAZAHN

FIRST DEGREE MURDER

SENTENCING VERDICT SLIP

I. GENERAL INSTRUCTIONS

A. READ THROUGH THE ENTIRE VERDICT SLIP BEFORE BEGINNING DELIBERATIONS.

B. AGGRAVATING AND MITIGATING CIRCUMSTANCES PRESENTED TO THE JURY.

1. The following aggravating circumstance(s) (are) submitted to the jury and must be proved by the Commonwealth *beyond a reasonable doubt:*

(1) Killing while in the Perpetration of a Felony.

(2) Significant history of Felony Convictions involving the use or threat of violence to the person.

2. The following mitigating circumstance(s) (are) submitted to the jury and must be proved by the defendant by a *preponderance of the evidence*:

Any evidence of mitigation concerning the character and record of the Defendant and the circumstances of his offense.

C. DO NOT COMPLETE THIS SENTENCING VERDICT SLIP UNTIL YOUR DELIBERATIONS ARE CONCLUDED. THIS SENTENCING VERDICT SLIP IS ONLY TO BE USED TO RECORD YOUR SENTENCING VERDICT AND THE FINDINGS UPON WHICH IT IS BASED.

D. IF, AFTER SUFFICIENT DELIBERATION, YOU CANNOT UNANIMOUSLY REACH A SENTENCING VERDICT, DO NOT COMPLETE OR SIGN THIS SLIP, BUT RETURN IT TO THE JUDGE. THE JUDGE WILL DETERMINE IF FURTHER DELIBERATIONS ARE REQUIRED; IF THEY ARE NOT, THE JUDGE WILL SENTENCE THE DEFENDANT TO LIFE IMPRISONMENT.

II. SENTENCING VERDICT AND FINDINGS

If you have reached a unanimous verdict, complete this part of the form.

In Section A. indicate whether the sentencing verdict is death or life imprisonment. If the sentence is death, indicate the basis for that verdict by completing Section B. If the sentence is life imprisonment, indicate the basis for that verdict by completing Section C.

A. We, the jury, unanimously sentence the defendant to (check one):

✓ Death

_ Life Imprisonment

[2] B. The findings on which the sentence of death is based are (check one):

____ 1. At least one aggravating circumstance and no mitigating circumstance.

The aggravating circumstance(s) unanimously found (is) (are):

_____

_____

_____

_____

_____

_____

_____

✓ 2. One or more aggravating circumstances which outweigh(s) any mitigating circumstance(s).

The aggravating circumstance(s) unanimously found (is) (are):

1. Killing while in the perpetration of a felony.

   a. Conviction of 1st degree murder of Richard Boyer.

   b. Murder of Perkovitch in Schuylkill County.

2. Significant history of felony convictions involving use or threat of violence to a person.

   a. Robbery conviction at Service Merchandise with threat and violence involved.

The mitigating circumstance(s) found by one or more of us (is) (are):

1. Testimony of mother.

2. Employer's testimony.

3. Pled guilty to 3rd degree murder.

C. The findings on which the sentence of life imprisonment is based are (check one):

____1. No aggravating circumstance exists.

____2. The mitigating circumstance(s) (is) (are) not outweighed by the aggravating circumstance(s).

[3] The mitigating circumstance(s) found by one or more of us (is) (are):

_____

_____

_____

The aggravating circumstance(s) unanimously found (is) (are):

_____

_____

_____

_____

1-22-99
DATE

/s/ Cynthia Rodriguez
JURY FOREPERSON

_____

COMMONWEALTH OF PENNSYLVANIA	:	In the Court of Common Pleas of Berks County,
vs.	:	Pennsylvania Criminal
DAVID ALLEN SATTAZAHN	:	No. 2194/89

SENTENCE
Tuesday, February 16, 1999
Reading, Pennsylvania

Before THE HONORABLE SCOTT D. KELLER,
President Judge

APPEARANCES:

For the Commonwealth: MARK C. BALDWIN, ESQUIRE
District Attorney
County of Berks
Fifth Floor, Services Center
633 Court Street
Reading, Pennsylvania 19601

For the Defendant: JOHN T. ADAMS, ESQUIRE
1720 Mineral Spring Road
Reading, Pennsylvania 19603

ALSO PRESENT: David Sattazahn, Defendant
James Sweitzer, Adult Probation and Parole Officer

DISTRIBUTION: Original and three (3) copies filed with the Clerk of Common Pleas – Criminal, to be distributed to each attorney and the Adult Probation and Parole Office,

and a copy to the computer data processor.

SENTENCE

AND NOW, this 16th day of February, 1999, the jury having returned a sentencing verdict imposing the sentence of death upon the defendant, David Allen Sattazahn, for the first degree murder of Richard Boyer in reference to Count No. 1 of the Information, the said defendant is now formally sentenced to death. He shall be put to death in a manner, time, and place as provided by law.

Said defendant shall be committed to the Bureau of Corrections for confinement in a State Correctional Facility until said sentence of death is carried out. Sentencing is effective this date.

BY THE COURT:

/s/ Scott D. Keller
P.J.

[J-064-2000]

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 258 Capital Appeal Docket
Appellee	:	Appeal from Judgment of Sentence entered February 16, 1999 in the Court of Common Pleas, Berks County, Criminal Division at No. 2194-89.
v.	:	
DAVID ALLEN SATTAZAHN,	:	
Appellant	:	
	:	ARGUED: May 1, 2000

OPINION

MADAME JUSTICE NEWMAN **DECIDED: November 27, 2000**

On January 22, 1999, a jury convicted Appellant David Allen Sattazahn (Sattazahn) of first-degree murder in the slaying of Richard Boyer (Boyer) and sentenced him to death. This is a direct appeal of this verdict. As explained below, this was a second trial for Sattazahn regarding the murder of Boyer. The initial trial resulted in a conviction for first-degree murder and the imposition of a life sentence, which the Superior Court reversed on appeal, ordering a new trial. For the reasons that follow, we affirm both the verdict of guilt, and the sentence of death on retrial.

[2] I. FACTUAL AND PROCEDURAL BACKGROUND

On Sunday evening, April 12, 1987, Sattazahn and his accomplice, Jeffrey Hammer (Hammer) hid in a cleared

wooded area waiting to rob Boyer, who was the manager of the Heidelberg Family Restaurant. They had watched Boyer for several weekends and determined that Sunday would be the busiest day in the restaurant. At closing, Sattazahn and Hammer confronted Boyer in the parking lot. Hammer carried a .41 caliber revolver and Sattazahn had a .22 caliber Ruger semiautomatic pistol. With these guns drawn, the pair attempted to rob Boyer of the bank deposit bag with the day's receipts, but Boyer threw the bag toward the restaurant and then again toward the roof of the restaurant. While Sattazahn told Boyer to get the bag, Boyer did not comply and began to run away. Both Sattazahn and Hammer fired shots and Boyer fell to the ground. The two men then grabbed the bank deposit bag and fled.

Following a lengthy trial, a jury on May 10, 1991 convicted Sattazahn of first, second and third-degree murder, two counts of aggravated assault, possession of an instrument of crime, carrying a firearm without a license, and criminal conspiracy. In the penalty phase, the Commonwealth presented one aggravating circumstance (commission of the killing while in the perpetration of a felony). Sattazahn presented as mitigating circumstances his lack of a significant history of prior criminal convictions and his age at the time of the crime. The jury deliberated without reaching a decision on death or life and without making any findings regarding aggravating or mitigating factors. After three and one-half hours, the judge dismissed the jury as hung, and entered a mandatory life sentence. On appeal, based on a jury instruction,

the Superior Court reversed and remanded for a new trial on the remaining charges.[1] [3]

To prepare for a retrial, on March 9, 1995, the Commonwealth filed a notice of intent to seek the death penalty, setting forth the aggravating circumstance presented at the first trial – commission of the killing while in the perpetration of a felony – and adding the circumstance that the defendant had a significant history of felony convictions involving the use or threat of violence to the person.[2] On March 13, 1995, Sattazahn's attorney filed a motion to prevent the Commonwealth from seeking the death penalty and from adding an additional aggravating factor in his retrial, which the trial court denied and the Superior Court affirmed. We denied allocatur and the second trial ensued, resulting in a conviction and the imposition of the death penalty.

---

[1] The Commonwealth filed a petition for allowance of appeal as to the jury instruction. Sattazahn filed a cross-petition for allowance of appeal on other issues. On April 15, 1994, this Court granted the Commonwealth's allocatur petition and denied Sattazahn's cross-petition. However, on December 24, 1994, this Court dismissed the appeal as improvidently granted.

[2] On September 19, 1991, in Berks County, Sattazahn entered guilty pleas on five different burglaries and one robbery. On February 14, 1992, the court sentenced Sattazahn for the burglaries and robbery, as well as sentencing him to life in prison for first-degree murder. He was also ordered to serve consecutive sentences on the remaining convictions from trial that had not merged. Sattazahn filed a timely appeal to the Superior Court. Shortly thereafter, on March 17, 1992, Sattazahn entered a guilty plea to third degree murder in Schuylkill [sic] County for a murder he committed on December 26, 1987. On April 1, 1992, Sattazahn entered a guilty plea for burglary charges in Lebanon County. On appeal, the Superior Court found there was insufficient evidence to support a conviction on the conspiracies to commit third degree murder and aggravated assault, thereby arresting judgment and dismissing those charges.

II. DISCUSSION

A. Sufficiency of the Evidence

Because this is a direct appeal death penalty case, we conduct an independent review of the sufficiency of the evidence supporting the jury's verdict of guilt on the charge of first-degree murder. *Commonwealth v. Clark,* 710 A.2d 31, 34 (Pa. 1998), *cert. denied,* [4] 119 S.Ct. 1465, 143 L.Ed.2d 550 (1999) (citations omitted). The analysis we use to determine if the evidence was sufficient to sustain the conviction for first-degree murder is, whether after viewing all the evidence in the light most favorable to the Commonwealth, as verdict winner, the evidence is sufficient to enable the trier of fact to find every element of the crime of first-degree murder beyond a reasonable doubt. *Id.* To find a defendant guilty of first-degree murder a jury must find that the Commonwealth has proven that he or she unlawfully killed a human being and did so in an intentional, deliberate and premeditated manner. It is the element of a willful, premeditated and deliberate intent to kill that distinguishes first-degree murder from all other criminal homicide. *Id.* Specific intent to kill may be inferred from the defendant's use of a deadly weapon upon a vital party [sic] of the victim's body. *Id.*

With this standard in mind, we have reviewed the evidence and have found it sufficient to support the jury's verdict. At trial, the Commonwealth presented the testimony of Hammer, who testified as to the details of the crime as recited in the fact portion above. Hammer's testimony was confirmed by an autopsy that revealed that Boyer suffered two gunshot wounds in the lower back and one each in the left shoulder, the lower face and the back of the head. All wounds were consistent with being caused by a .22 caliber bullet, the caliber gun that Hammer

attributed to Sattazahn, and which a gun shop owner testified that Sattazahn purchased. Moreover, the .22 and the two slugs recovered from Boyer's body, and the five cartridges found at the scene, were identified as being fired from Sattazahn's gun.

A review of the Record indicates that the facts were more than sufficient to support the conviction. We now turn to the specific issues that Sattazahn has raised.

B. Cross-examination of Hammer

Sattazahn raises two alleged errors based on the trial court's limitation upon the cross-examination of Hammer: (1) regarding Hammer's guilty plea, and (2) preclusion of police reports regarding Hammer, which contained allegedly inconsistent statements.

[5] We discuss first whether Sattazahn is entitled to a new trial because the trial court did not allow defense counsel to cross-examine Sattazahn's cohort in the murder, Jeffrey Hammer, regarding the details of his guilty plea for the third-degree murder of Boyer. Sattazahn argues, *citing Commonwealth v. Birch,* 616 A.2d 977 (Pa. 1992) and *Commonwealth v. Johnson,* 638 A.2d 940 (Pa. 1994), that counsel should have been able to cross-examine the witness broadly to determine his bias to testify that he did not murder Richard Boyer.

> As a general rule, evidence of interest or bias on the part of a witness is admissible and constitutes a proper subject for cross-examination. It is particularly important that, where the determination of a defendant's guilt or innocence is dependent upon the credibility of a prosecution witness, an adequate opportunity be afforded to

> demonstrate through cross-examination that the witness is biased.

Commonwealth v. Birch, 616 A.2d 977, 979 (Pa. 1992). Further, if the Commonwealth's witness might be biased because of treatment received in relation to a plea agreement we have stated that:

> whenever a prosecution witness may be biased in favor of the prosecution because of outstanding criminal charges or because of any non-final criminal disposition against him within the same jurisdiction, that possible bias, in fairness, must be made known to the jury. Even if the prosecutor has made no promises, either on the present case or on other pending criminal matters, *the witness may hope for favorable treatment from the prosecutor if the witness presently testifies in a way that is helpful to the prosecution. And if that possibility exists, the jury should know about it.* The jury may choose to believe the witness even after it learns of actual promises made or possible promises of leniency which may be made in the future, but the defendant, under the right guaranteed in the Pennsylvania Constitution to confront witnesses against him, must have the opportunity at least to raise a doubt in the mind of the jury as to whether the prosecution witness is biased. [6] It is not for the court to determine whether the cross-examination for bias would affect the jury's determination of the case.

Commonwealth v. Hill, 566 A.2d 252 (Pa. 1988), *reargument denied,* 582 A.2d 857 (Pa. 1990), *citing, Commonwealth v. Evans,* 512 A.2d 626-27 (Pa. 1986) (emphasis added).

We have thoroughly reviewed the record and find no instance where defense counsel was prevented from presenting the bias of Hammer. While the trial court sustained several objections related to defense counsel's cross-examination of Hammer when counsel asked Hammer to read a count of the murder charge against him, (N.T. at 347) this ruling did not hinder Sattazahn's ability to show that Hammer was biased. Through counsel's cross-examination of Hammer, the jury heard that Hammer was allowed to plead to third-degree murder in exchange for his testimony against Sattazahn, even though the Commonwealth was at the time seeking the death penalty against Hammer for the murder of Boyer. (N.T. at 331). Thus, Hammer was able to avoid the imposition of the death penalty for his part in the murder because he had agreed to testify against Sattazahn. Additionally, due to Hammer's checkered criminal past for felony burglary, he faced potential jail time of 240 years, but because of the guilty plea and testimony against Sattazahn, he could be paroled for all of his crimes in nineteen years. (N.T. at 228-333). The jury heard more than sufficient evidence to raise bias and we therefore reject Sattazahn's claim that he is entitled to a new trial on this issue.

We now address Sattazahn's contention that the trial court erred in not allowing counsel to cross-examine Hammer regarding statements given to members of the State Police, which would indicate that Hammer lied to them. We reject Sattazahn's argument because again the record does not support his claim. While the trial court did sustain an objection to showing the witness one police report, ultimately defense counsel was successful in showing Hammer another police report after which Hammer testified that he had lied to police. (N.T. at 337-338,

341). Therefore, we agree with the Commonwealth that [7] at best, the impeachment of Hammer with the police report about which he now complains would have been cumulative evidence. Moreover, any error did not prejudice Sattazahn given that the jury heard ample evidence that Hammer lied to police regarding his involvement with several burglaries. Accordingly, Sattazahn is not entitled to a new trial on this issue.

C. Jury Charge

Sattazahn next contends that the trial court erred in its charge regarding "inconsistent statements" given by Hammer and another witness, Franz Wanner. Sattazahn, without any legal authority, argues that the instruction of the court took away from the jury its fact-finding ability. We do not agree. A jury charge by the trial court should be evaluated based on the entire charge and not on discrete portions. *Commonwealth v. Saranchak*, 675 A.2d 268, 276 (1996), *cert. denied*, 519 U.S. 1061 (1997). The only inquiry is whether the instruction adequately, clearly and accurately presents the issue to the jury. *Id.*

The standard jury instruction regarding prior inconsistent statements states the following:

> You have heard evidence that a witness, ___, made a statement on an earlier occasion that was inconsistent with his present testimony. You may consider this evidence for one purpose only, to help you judge the credibility and weight of the testimony given by the witness at this trial. You may not regard the evidence of an earlier inconsistent statement as proof of the truth of anything said in the statement.

Pa.SSJI Crim. 4.08A. The instruction that the trial court gave was essentially identical except that the court stated that each witness "made a statement on an earlier occasion that *may be* inconsistent with his present testimony" and then continued to give the standard instruction verbatim. (N.T. at 519) (Emphasis added). We fail to see how this instruction took away any fact-finding function of the jury and instead we believe that the [8] charge as a whole adequately, clearly and accurately presented the issue to the jury, particularly where it is not entirely clear that either witness made a truly inconsistent statement. Thus, Sattazahn is not entitled to a new trial.

D. Introduction of Evidence in Penalty Phase

By permitting the Commonwealth to introduce evidence during the penalty phase of the trial regarding the nature of prior offenses and alleged facts surrounding the defendant's prior convictions, Sattazahn claims the trial court erred. We disagree. From the time this Court decided *Commonwealth v. Beasley*, 479 A.2d 460 (Pa. 1984), we have consistently held that, in the penalty phase of the trial, the prosecution is permitted to examine the facts surrounding a defendant's previous felony convictions so that a jury may assess whether these prior crimes involved violence sufficient to support the aggravating circumstance in 42 Pa.C.S.A. § 9711(d)(9). *See also Commonwealth v. Reid*, 626 A.2d 118 (Pa. 1993). Accordingly, the trial court did not err in allowing the Commonwealth to present the facts behind Sattazahn's prior guilty pleas for third degree murder and burglary.

Moreover, while Sattazahn baldly contends that Trooper Johnson's testimony was inadmissible and prejudicial

hearsay regarding the details of his past crimes, he does not point to any specific instances, nor does he articulate how any of the troopers' statements prejudiced him. Our review of the record does not support his claims and instead, the properly admitted evidence amply supports the aggravating factor that Sattazahn had a history of committing violent felonies, including murder and burglary. *Cf., Commonwealth v. Young,* 637 A.2d 1313, 1319 n. 9 (Pa. 1993), *cert. denied,* 511 U.S. 1012 (1994) (testimony of officer properly admitted to establish details of crime to support aggravating factor of violent felonies.)

E. Constitutionality of Death Penalty on Retrial

Sattazahn next challenges the constitutionality of allowing the Commonwealth to seek the death penalty on retrial where he received a life sentence in his initial trial. He [9] argues that the Pennsylvania Constitution prohibits its imposition of the death penalty because it guarantees a right to an appeal, equal protection and protection from double jeopardy and that *Commonwealth v. Martorano,* 634 A.2d 1063 (Pa. 1993) was wrongly decided on federal constitutional principles.

We address first the argument that in *Martorano* we wrongly interpreted federal constitutional principles pursuant to *Bullington v. Missouri,* 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981) and *Arizona v. Rumsey,* 467 U.S. 203, 104 S.Ct. 2305, 81 L.Ed.2d 164 (1984). As we set forth in *Martorano,* the United States Supreme Court has consistently reaffirmed the basic principle that the constitutional guarantee against double jeopardy imposes no limitations upon the power to retry a defendant who has succeeded in getting his first conviction set aside. 634 A.2d

at 1068-69. Since the original conviction is nullified at a defendant's behest, the "slate was wiped clean," and the sentencing court can impose any legally authorized sentence, whether or not it is greater than the sentence imposed following the first trial. *Martorano,* 634 A.2d at 1068, *citing North Carolina v. Pearce,* 395 U.S. 711, 720-21 (1969). An exception to this rule exists where the sentencing proceeding resembles a trial. *See, Burlington* [sic]; *Rumsey.*

In *Bullington,* a defendant was tried for capital murder and at the guilt phase of trial, the jury returned a verdict of guilty. As required by statute, the trial court then conducted a sentencing hearing before the same jury that had found the defendant guilty. The parties were afforded the opportunity to present additional evidence in aggravation or mitigation of punishment. After argument, instructions from the judge and deliberation, the jury returned a unanimous verdict of life imprisonment. When Bullington was granted a new trial on appeal, the state notified him of its intention to seek again the death penalty. Because the first sentencing jury, by choosing life, impliedly decided that the prosecution had not proved its case for death, the result was that the jury "acquitted" the defendant of [10] the death penalty. This "acquittal on the merits" precludes the State from seeking the death penalty upon retrial. 451 U.S. at 434-35.

In *Rumsey,* the Court applied *Bullington* to preclude the state from seeking the death penalty upon retrial after the trial judge "acquitted" the defendant of the death penalty at the sentencing hearing. Justice O'Connor wrote:

> The double jeopardy principle relevant to respondent's case is the same as that invoked in *Bullington:* an acquittal on the merits by the sole decisionmaker in the proceeding is final and bars

> retrial on the same charge. Application of the *Bullington* principle renders respondent's death sentence a violation of the Double Jeopardy Clause because respondent's initial sentence of life imprisonment was undoubtedly an acquittal on the merits of the central issue in the proceeding – whether death was the appropriate punishment for respondent's offense. The trial court entered findings denying the existence of each of the seven statutory aggravating circumstances, and as required by state law, the court then entered judgment in respondent's favor on the issue of death. That judgment, based on findings sufficient to establish legal entitlement to the life sentence, amounts to an acquittal on the merits and, as such, bars any retrial of the appropriateness of the death penalty.

104 S.Ct. at 2310.

In *Martorano,* we applied *Bullington* and *Rumsey* and held that the Commonwealth is not precluded from seeking the death penalty on retrial, where, following their first trial, defendants were convicted of first-degree murder and sentenced to life imprisonment, not by a unanimous jury verdict, but by the trial judge following the jury's deadlock regarding the penalty. The hung jury did not act as an acquittal on the merits as did the proceedings at issue in *Bullington* and *Rumsey.*

Sattazahn argues that *Martorano* was wrongly decided because it is irrelevant whether the life sentence is a result of a unanimous jury verdict or operation of law following jury deadlock because either situation is an acquittal on the merits. This is the [11] exact issue raised by the Appellant in *Martorano* and after a thorough discussion of *North Carolina v. Pearce,* 395 U.S. 711, 89 S.Ct.

2072, 23 L.Ed.2d 656 (1969); *Bullington v. Missouri,* 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981); *Arizona v. Rumsey,* 467 U.S. 203, 104 S.Ct. 2305, 81 L.Ed.2d 164 (1984) and *Poland v. Arizona,* 476 U.S. 147, 106 S.Ct. 1749, 90 L.Ed.2d 123 (1986) we rejected it stating that:

> What respondents fail to apprehend is the significance of the absence of decision in the instant case. Here, unlike the sentencer in *Bullington* or the other cases just discussed, the jury did not make a decision on the merits regarding an appropriate penalty. It did not find that the state had failed to prove its case. It made no findings about the existence of any aggravating or mitigating circumstances. It was deadlocked. Since it made no decision, there could not in fact be any " acquittal on the merits." Nor did the imposition of a life sentence by the trial judge operate as an acquittal. Under Pennsylvania's sentencing scheme, the judge has no discretion to fashion sentence once he finds that the jury is deadlocked. The statute directs him to enter a life sentence. 42 Pa.C.S. § 9711(c)(1)(v) (. . . if . . . further deliberation will not result in a unanimous agreement as to the sentence, . . . the court shall sentence the defendant to life imprisonment.) (emphasis added). The judge makes no findings and resolves no factual matter. Since judgment is not based on findings which resolve some factual matter, it is not sufficient to establish legal entitlement to a life sentence. A default judgment does not trigger a double jeopardy bar to the death penalty upon retrial.

634 A.2d at 1070. In addition, in *Martorano* we rejected the argument that, because the death penalty statute makes no distinction between a unanimous jury verdict of life imprisonment and a jury's deadlock, a hung jury

equals an acquittal on the merits. In rejecting this argument, we stated that:

> While at first blush this interpretation may seem appealing, it loses its force when both subsections are read together and in their entirety. Subsection (iv) specifies the possible jury verdicts which may be entered upon conviction for first-degree [12] murder. Subsection (v) details the sentencing procedure to be followed in the absence of a jury verdict, i.e. when "further deliberation will not result in a unanimous agreement as to the sentence". Contrary to respondents' contentions, the last sentence of subsection (iv) states nothing more than that the verdict is life imprisonment when the jury unanimously agrees that the sentence should be life because there was neither (1) one aggravating and no mitigating circumstance, nor (2) aggravating circumstances sufficient to outweigh the mitigating circumstances. In the absence of a unanimous verdict, subsection (v) provides for the discharge of the jury and imposition of a life sentence by the court.
>
> If the jury's failure to reach a unanimous agreement as to sentence could function as a verdict, subsection (v) would be superfluous. When there is a verdict, the court does not discharge the jury. Instead, it receives and records the verdict, and imposes the sentence fixed by the jury.
>
> Since there was no jury unanimity as to sentence during respondents' first trial, there could be no jury verdict. Accordingly, there was no acquittal on the merits of the death penalty. Nothing in Pennsylvania's sentencing statute precludes imposition of the death penalty upon reconviction, so long as the sentencer finds that the evidence is sufficient to warrant it.

634 A.2d at 1072. Sattazahn offers no compelling reason for us to reverse *Martorano* today, and we decline to do so.

We now turn to Sattazahn's argument that Pennsylvania's constitutional provisions regarding double jeopardy, right of appeal, due process and equal protection bar the Commonwealth from seeking the death penalty on retrial. We must reject this claim as we have held otherwise in *Martorano,* where this Court held that Pennsylvania's constitutional analysis of these issues is the same as the federal approach. We stand by that decision. Accordingly, the Pennsylvania Constitution does not prohibit the Commonwealth from seeking the death penalty on retrial where a life sentence is imposed in the first trial.

[13] Sattazahn argues that *Martorano* is flawed because it failed to consider a defendant's Pennsylvania constitutional right of appeal pursuant to Article V, which has no counterpart in the federal constitution and that this Article, in combination with Pennsylvania's double jeopardy, due process and equal protection provisions, affords greater rights. Most of this argument is in reality a rehashing of the arguments that we soundly rejected in *Martorano* except that Sattazahn puts a new gloss on the argument, claiming that to allow the Commonwealth to seek the death penalty on retrial acts as a de facto denial of the right to appeal. His argument is that any rational defendant who receives a life sentence imposed by a judge after a hung jury during the penalty phase will forego his or her appeal for fear of being executed should he or she win on appeal but lose upon retrial. In other words, it has a chilling effect on any defendant exercising his or her constitutional rights. Sattazahn points to other states having a state constitutional right to appeal such as Louisiana, New Jersey, Utah, Alaska, California and West

Virginia. He argues that Pennsylvania should embrace the policy considerations set forth in the case law of these states.

We reject Sattazahn's invitation to expand the interpretation of our Constitution and reaffirm our holding in *Martorano* that "the federal approach to this issue is a sound one. It accords respondents the right to a fair trial, while preserving society's interest in imposing the appropriate punishment on one who has been convicted after obtaining such a trial." 634 A.2d at 1071. Moreover, we do not believe that a defendant's right to appeal is "chilled." In *Chaffin v. Stynchcombe,* 412 U.S. 17, 93 S.Ct. 1977, 36 L.Ed.2d 714 (1973), which we relied upon in *Martorano* to reject the Appellant's federal Fourteenth Amendment arguments, the Supreme Court aptly stated that the Constitution does not forbid:

> every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights.
>
> * * *
>
> [14] *the choice occasioned by the possibility of a harsher sentence . . . does not place an impermissible burden on the right of a criminal defendant to appeal . . . his conviction.*

Chaffin v. Stynchcombe, 412 U.S. at 30, 35 (emphasis added).

Sattazahn ignores the fact that in *Chaffin* the United States Supreme Court has rejected the claim that a harsher sentence on retrial has a chilling effect on the defendant's right to appeal or collaterally attack his conviction. We believe that this analysis applies equally to Sattazahn's arguments pursuant to the Pennsylvania

Constitution and thus, stand by our determination in *Martorano* that there is no distinction between the state and federal approaches with regard to whether the prosecution can seek a harsher sentence at retrial.

F. Addition of Aggravating Factor

Last, Sattazahn argues that the Commonwealth should not have been allowed to add an additional aggravating factor because there is no statutory authority for the addition of aggravating factors upon retrial when the original sentence was life imprisonment. We disagree. As we stated in *Martorano,* an order for a new trial wipes the slate clean. The criminal history of Sattazahn changed since the original trial in May of 1991. At the time of the retrial, he had a significant history of felony convictions that involve the threat of violence to the person. The fact that the offenses occurred after the instant murder is irrelevant under the law. *E.g., Commonwealth v. Williams,* 660 A.2d 1316, 1323 (Pa. 1995) (jury may consider all of defendant's existing convictions, including crimes committed after the crime at issue). Thus, the trial court did not err.

III. CONCLUSION

Finding no error, we affirm both the verdict of guilt and the sentence of death on retrial. The Prothonotary is hereby directed to transmit to the Governor's Office the [15] complete records of the trial, sentencing hearing, imposition of sentence and review by the Supreme Court of Pennsylvania pursuant to 42 Pa.C.S. § 9711(i).

Mr. Justice Saylor files a dissenting opinion in which Mr. Chief Justice Flaherty and Mr. Justice Nigro join.

DISSENTING OPINION

MR. JUSTICE SAYLOR DECIDED: November 27, 2000

As the majority observes, precedent at both the federal and state levels would allow a capital defendant who has been sentenced to life imprisonment as the result of a deadlocked jury to be exposed to the death penalty upon retrial. Nevertheless, I am troubled by the chilling effect that such a rule places upon the right of appeal guaranteed by our state Constitution. In my view, the ends of justice would be better served if, in our supervisory role respecting the administration of capital cases in Pennsylvania, we were to require that such a defendant, if convicted upon retrial, must receive the life sentence originally imposed. Such a requirement would be consistent with the legislative intent that if even a single juror decides against the death penalty, the penalty will not be imposed. Accordingly, I respectfully dissent.

Mr. Chief Justice Flaherty and Mr. Justice Nigro join this dissenting opinion.

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

November 27, 2000 — Case DECIDED and Judgment entered for the following matter:

NEWMAN, J.:

Commonwealth of Pennsylvania,
Appellee

v.

David Allen Sattazahn,
Appellant

No. 258
Capital Appeal Docket
(J-64-2000)

WE AFFIRM BOTH THE VERDICT OF GUILT, AND THE SENTENCE OF DEATH ON RETRIAL

Mr. Justice Saylor files a dissenting opinion in which Mr. Chief Justice Flaherty and Mr. Justice Nigro join.

Office of the Clerk
Supreme Court of the United States
Washington, D.C. 20543-0001

March 18, 2002

Robert B. Dunham, Esq.
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Philadelphia, PA 19106

Re: ***01-7574 – Sattazahn v. Pennsylvania***

Dear Mr. Dunham:

The Court today entered the following order in the above case:

> "The motion of petitioner for leave to proceed in forma pauperis and the petition for a writ of certiorari are granted."

If you have any questions, please contact me.

Sincerely,

WILLIAM K. SUTER, CLERK
/s/ Denise J. McNerney
Denise J. McNerney
Merits Cases Clerk
(202) 479-3032

Enclosures

No. 01-7574

Supreme Court, U.S.
FILED
JUN 3 2002

In The
Supreme Court of the United States

DAVID ALLEN SATTAZAHN,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Pennsylvania

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CAPITAL CASE

QUESTIONS PRESENTED

1. Does the Double Jeopardy Clause of the Fifth Amendment bar imposition of the death penalty upon reconviction after an initial conviction, set aside on appeal, in which the trial court imposed a statutorily mandated life sentence when the capital sentencing jury failed to reach a unanimous verdict?

2. Whether a capital defendant's life and liberty interest in the mandatory imposition of a life sentence required by state law where the sentencing jury fails to reach a unanimous verdict was violated when the state sought death sentence on retrial?

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CITATION TO OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania is reported as *Commonwealth v. Sattazahn*, 563 Pa. 533, 763 A.2d 359 (2000), and is reprinted in the Joint Appendix (hereinafter "J.A.") at 91-109.

JURISDICTION

The decision of the Pennsylvania Supreme Court was rendered on November 27, 2000. Petitioner timely filed an application for reargument, which was denied on July 20, 2001. *Commonwealth v. Sattazahn*, 2001 WL 826060 (Pa. July 20, 2001). On October 1, 2001, Justice Souter granted Petitioner an extension until December 17, 2001 to file his petition for a writ of certiorari, which was filed on that date and granted on March 18, 2002. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, which provides in relevant part:

> nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb. . . .

2. It also involves Section 1 of the Fourteenth Amendment to the United States Constitution, which provides in relevant part:

> nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

3. It also involves a constitutional life and liberty interest arising out of 42 PA. C.S. §§ 9711(c)(1)(iv) & (v), which provide in pertinent part:

> (iv) the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance specified in subsection (d) and no mitigating circumstance or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances. The verdict must be a sentence of life imprisonment in all other cases.
>
> (v) the court may, in its discretion, discharge the jury if it is of the opinion that further deliberation will not result in a unanimous agreement as to the sentence, in which case the court shall sentence the defendant to life imprisonment.

STATEMENT OF THE CASE

Petitioner, David Allen Sattazahn, was convicted of murder, robbery, and related offenses following a jury trial in the Berks County Court of Common Pleas in May 1991. *Commonwealth v. Sattazahn*, No. 2194/89 (Berks C.P.). At trial, the prosecution presented evidence that Richard Boyer was found shot to death on April 13, 1987, following an apparent robbery of the restaurant Mr. Boyer managed. Record, N.T. 5/2-3/91 at 45-48. The Commonwealth's case relied primarily on the testimony of Petitioner's co-defendant, Jeffrey Hammer. Pursuant to an agreement

with the Commonwealth,[1] Mr. Hammer testified that he and Petitioner had both been involved in planning the robbery and had cased the restaurant in the days before the April 12, 1987 robbery. Their plan, he testified, had been to rob the manager and then handcuff him. Record, N.T. 5/6/91 at 514-15. Prior to the robbery, Mr. Hammer and Petitioner retrieved two handguns, holsters, and ammunition. Record, N.T. 5/6/91 at 494-96. Mr. Hammer testified that he had a .41 caliber gun and Petitioner carried a .22 caliber gun.

Mr. Hammer further testified that he and Petitioner waited for the manager to leave the restaurant and, as Mr. Boyer was walking towards his truck, they approached him and told him to drop the bank bag. Record, N.T. 5/6/91 at 504. Mr. Boyer threw the bag twice then began to run away. Mr. Hammer testified that both he and Petitioner had fired their weapons. He said that Petitioner was the first to shoot, and that after Mr. Hammer fired, he heard two or three more shots. Record, N.T. 5/6/91 at 506-09. Mr. Hammer testified that Petitioner then retrieved the bank bag, they fled the scene and subsequently divided the money. Record, N.T. 5/6/91 at 510-11, 515, 520-21.

The Commonwealth also presented evidence, through the autopsy and police testimony, indicating that the decedent had suffered wounds consistent with a .22 caliber weapon and that cartridges found at the scene had been fired from a Ruger Mark II .22 caliber gun. Record, N.T. 5/3/91 at 239, 338. Although the salesperson in the

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[1] In exchange for his testimony, the Commonwealth agreed that Mr. Hammer would receive a sentence of a term of years rather than face capital prosecution. Record, N.T. 5/3/91 at 580.

gun store could not identify Petitioner as the person who purchased that weapon some two months before the robbery/murder (*see* Record, N.T. 5/3/91 at 381), the Commonwealth also presented a police handwriting expert who concluded that the signature on paperwork generated in the sale of that weapon was consistent with Petitioner's handwriting. Record, N.T. 5/6/91 at 481-85.

Following presentation of the evidence, the jury found Petitioner guilty and the case proceeded to a capital sentencing hearing on May 9, 1991. At the start of the hearing, the trial court provided the jury introductory instructions on the nature of aggravating and mitigating circumstances and the parties' respective burdens of proof. Record, N.T. 5/9/91 at 19-20; J.A. at 10-11. The parties then presented evidence in support of aggravating and mitigating circumstances, and rested their respective cases. Record, N.T. 5/9/91 at 20-30.

After the close of evidence, the court recessed for the day. The next morning, following argument, the trial court fully instructed the jury on its sentencing options and obligations. Record, N.T. 5/10/91, at 55-60; J.A. at 15-20.

The court again instructed the jury that the Commonwealth bore the burden of proving aggravating circumstances beyond a reasonable doubt, while the defense was required to prove mitigating circumstances by a preponderance of the evidence. Record, N.T. 5/10/91, at 55-56; J.A. at 15-16. The Court also instructed the jury that it must return a death sentence if all of the jurors found at least one aggravating circumstance and no mitigating circumstances or if the jury found that aggravating circumstances outweighed mitigating circumstances, but that the jury must return a sentence of life imprisonment in all other circumstances. Record, N.T. 5/10/91, at 55; J.A.

at 15-16 ("If you do not all agree on one or more of the other of these findings then the only verdict you may return is a sentence of life imprisonment."); *id.* at 57; J.A. at 17 ("As I told you earlier, and as the verdict slip indicates, you must agree unanimously on one of the two general findings before you can sentence the defendant to death").

The trial court further instructed the jury that the court was required as a matter of law to impose a sentence of life imprisonment if the jury could not reach a unanimous verdict of either life or death:

> If you are still unable to agree on a verdict after conscientious and thorough deliberations, report that to me. If it seems to me that you are hopelessly deadlocked *it will be my duty to sentence the defendant to life imprisonment.*[2]

Record, N.T. 5/10/91, at 58; J.A. at 18.

Per Rule 358A of Pennsylvania's *Rules of Criminal Procedure* (subsequently renumbered as PA. R. CRIM. P. 807), the court also provided the jury with a verdict slip, which it instructed the jury to read before commencing its deliberations. Record, N.T. 5/10/91, at 58-59, 60; J.A. at 18, 19. Part D of the instructions on that verdict slip stated in bold capital letters (J.A. at 27):

> **D. IF, AFTER SUFFICIENT DELIBERATION, YOU CANNOT UNANIMOUSLY REACH A SENTENCING VERDICT, DO NOT COMPLETE OR SIGN THIS SLIP, BUT RETURN IT TO THE JUDGE. THE JUDGE WILL DETERMINE IF FURTHER DELIBERATIONS ARE**

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[2] All emphasis supplied unless otherwise indicated.

REQUIRED; IF THEY ARE NOT, THE JUDGE WILL SENTENCE THE DEFENDANT TO LIFE IMPRISONMENT.

After three-and-one-half hours of deliberation, the jury returned with a note, signed by the jury foreperson, stating: "Your Honor – [¶] We, the jury are hopelessly deadlocked at 9-3 for life imprisonment. Each one is deeply entrenched in their position. We do not expect anyone to change his or her position." Record, N.T. 5/10/91, at 67; Court Exhibit No. 4; J.A. at 25.

The trial court conducted the factual inquiry mandated by Pennsylvania law to ascertain whether the sentencing jury was unable to reach a unanimous verdict. Record, N.T. 5/10/91, at 62-64; J.A. at 21-24. Finding the jurors deadlocked, the trial court discharged the jury and announced that it would impose a life sentence upon Petitioner, as statutorily mandated by 42 PA. C.S. § 9711(c)(1)(v):

> THE COURT: . . . The Court at this time finding that you are unable to find unanimously for either sentence of death or life imprisonment will discharge you from your duties in deliberating any further in this particular case. And because of that, as a result of your inability to unanimously decide, the Court, by virtue of the l..w, will at the time of formal imposition of sentence sentence this defendant to life imprisonment.

Record, N.T. 5/10/91, at 64; J.A. at 23-24.

On February 14, 1992, the court formally imposed that life sentence and remanded Petitioner into the custody of the state prison system to serve that sentence. *See* Record, Sentencing Order, Sentencing Guideline Sentence Form/Commitment Authorization; J.A. at 30, 35, 40.

The Commonwealth could not appeal this adjudication of sentence, nor could Petitioner appeal any issue relating to this legal determination of life over death.

On March 12, 1992, Petitioner appealed his convictions to the Superior Court of Pennsylvania, the Commonwealth's intermediate appellate court. *Commonwealth v. Sattazahn*, No. 01024 PHILA (Pa. Super.). On July 30, 1993, the Superior Court reversed. *Commonwealth v. Sattazahn*, 428 Pa. Super. 413, 631 A.2d 597 (1993), *rearg. denied* Oct. 6, 1993. The Commonwealth filed for allowance of appeal, and Petitioner sought allowance of cross-appeal on other guilt-stage issues. *Commonwealth v. Sattazahn*, No. 0544 M.D. 1993 (Pa.). On April 15, 1994, the Supreme Court of Pennsylvania denied Petitioner's motion and initially granted the Commonwealth allowance of appeal. *Commonwealth v. Sattazahn*, 537 Pa. 639, 644 A.2d 162 (1994). However, on December 30, 1994, the Court dismissed that appeal as having been improvidently granted. *Commonwealth v. Sattazahn*, 539 Pa. 270, 652 A.2d 293 (1994). The case returned to the Berks County Court of Common Pleas for a new trial.

On March 9, 1995, the Commonwealth filed notice of intent to seek the death penalty on retrial. J.A. at 47-53. Four days later, Petitioner moved to prevent the Commonwealth from capitally retrying him. The Court of Common Pleas, per Judge Keller, held that neither the state or federal constitutions nor Pennsylvania law, prevented Petitioner "from choosing between his right to appeal a life sentence mandated by 42 Pa. C.S.A. §9711(c)(2) *and the remote risk of a death sentence upon retrial*." Opinion of the Trial Court, at 1 (July 19, 1995) ("Pretrial Opinion"); J.A. at 54.

Petitioner appealed this order to the Superior Court, No. 02274 PHILA 1995. On April 18, 1996, a split panel of the Superior Court affirmed. Slip op. (Apr. 18, 1996) (with Brosky, J., dissenting), *rearg. denied*, June 21, 1996; J.A. at 73-81. The intermediate appellate court relied upon the Pennsylvania Supreme Court's per curiam decision in *Commonwealth v. Martorano*, 535 Pa. 178, 634 A.2d 1063 (1993), which held that a directed verdict of life imposed by the trial court after the sentencing jury could not reach a unanimous verdict did not constitute an acquittal of death and so did not implicate double jeopardy. The Supreme Court of Pennsylvania denied Mr. Sattazahn's petition for allowance of appeal from the Superior Court's decision. *Commonwealth v. Sattazahn*, 547 Pa. 742, 690 A.2d 1162 (1997) (No. 469 M.D. 1996). Petitioner reasserted and preserved his objections to capital retrial in an *in camera* pretrial proceeding on December 29, 1998. Record, N.T. *In Camera* Pretrial Hearing, 12/29/98, at 3-4; J.A. at 83. The trial court again rejected Petitioner's objections to a capital retrial. *Id.*

The retrial was conducted between January 12 and January 22, 1999. On January 22, the death-qualified jury found Petitioner guilty of first degree murder and related charges. Later that same day, the court conducted a brief sentencing-stage hearing[3] at which "the remote risk of a death sentence upon retrial" became a reality: Mr. Sattazahn was sentenced to death. *See* Record, Verdict Slip at 2; J.A. at 86. The trial court formally imposed sentence on

[3] The entire defense case at resentencing occupies twelve pages of transcript. Record, N.T. 1/22/99, at 592-603.

February 16, 1999, Record, Sentencing Order; J.A. at 90, and Petitioner filed a notice of appeal on February 25, 1999.

Petitioner challenged his conviction and sentence on a number of grounds, including those asserted herein. On November 27, 2000, the Pennsylvania Supreme Court upheld Petitioner's conviction and death sentence by a bare 4-3 majority. *Commonwealth v. Sattazahn*, 563 Pa. 533, 763 A.2d 359 (2000); J.A. at 91-109.[4] As had the Superior Court in 1996, the Pennsylvania Supreme Court relied upon its 1993 per curiam decision in *Martorano* to reject Petitioner's double jeopardy claim. *Sattazahn*, 563 Pa. at 545-49, 763 A.2d at 366-68; J.A. at 100-05. It wrote:

> Sattazahn argues that *Martorano* was wrongly decided because it is irrelevant whether the life sentence is a result of a unanimous jury verdict or operation of law following jury deadlock because either situation is an acquittal on the merits. This is the exact issue raised by the Appellant in *Martorano* and after a thorough discussion of *North Carolina v. Pearce,* 395 U.S. 711 (1969); *Bullington v. Missouri,* 451 U.S. 430 (1981); *Arizona v. Rumsey,* 467 U.S. 203 (1984) and *Poland v. Arizona,* 476 U.S. 147 (1986) we rejected it.

Sattazahn, 563 Pa. at 547, 763 A.2d at 367; J.A. at 102-03.

The state court, tracking its analysis of double jeopardy in *Martorano*, interpreted this Court's double jeopardy

[4] Three Justices dissented on the grounds that the capital retrial unconstitutionally burdened Petitioner's state constitutional right to appeal.

rulings as applying only where there has been a prior factfinding by the ultimate sentencer that resulted in an "implied acquittal" of death. It wrote:

> In *Martorano,* we applied *Bullington* and *Rumsey* and held that the Commonwealth is not precluded from seeking the death penalty on retrial, where, following their first trial, defendants were convicted of first-degree murder and sentenced to life imprisonment, not by a unanimous jury verdict, but by the trial judge following the jury's deadlock regarding the penalty. The hung jury did not act as an acquittal on the merits as did the proceedings at issue in *Bullington* and *Rumsey.*

Sattazahn, 563 Pa. at 547, 763 A.2d at 367; J.A. at 102. The state court distinguished *Bullington* on the grounds that the unanimous jury verdict in that case had "impliedly decided that the prosecution had not proved its case for death," whereas the non-unanimous "hung jury" in this case did not itself reach a verdict. *Id.* at 546, 763 A.2d at 366; J.A. at 101. It then distinguished *Rumsey* on the grounds that the trial court in *Rumsey* had imposed a life sentence only after itself making predicate findings of fact that the prosecution had failed to prove its case for death, whereas here "the imposition of a life sentence by the trial judge [did not] operate as an acquittal." *Id.* at 548, 763 A.2d at 367; J.A. at 103 (quoting *Martorano*).

The state court anchored its no-acquittal reasoning on the fact that "[u]nder Pennsylvania's sentencing scheme, the judge has no discretion to fashion sentence once he finds that the jury is deadlocked. The statute directs him to enter a life sentence." *Id.* (citing 42 PA. C.S. § 9711(c)(1)(v)). Therefore, the court opined, "the judge

makes no findings and resolves no factual matter. Since judgment is not based on findings which resolve some factual matter, it is not sufficient to establish legal entitlement to a life sentence. A default judgment does not trigger a double jeopardy bar to the death penalty upon retrial." *Id.*

The Pennsylvania Supreme Court also relied upon *Martorano* to summarily reject Petitioner's due process claim. *Id.* at 549, 763 A.2d at 368; J.A. at 105-07. Although the state court stated that the due process claim had been raised as a state law issue, it opined that "Pennsylvania's constitutional analysis of these issues is the same as the federal approach." *Id.*; J.A. at 105.

Petitioner timely sought reargument based upon the state court's failure to take into consideration this Court's post-*Martorano* double jeopardy decisions, and because the state court had failed to address his due process claim. With two Justices dissenting, the Pennsylvania Supreme Court denied Petitioner's application for reargument on July 20, 2001. *Commonwealth v. Sattazahn*, 2001 WL 826060 (Pa. July 20, 2001) (per curiam). On December 17, 2001, Petitioner timely filed a Petition for writ of certiorari, seeking review of his case. This Court granted certiorari.

SUMMARY OF ARGUMENT

David Sattazahn received a life sentence after a capital trial and sentencing proceeding, tried to completion in 1991. After reversal of his original conviction, Pennsylvania once again sought, and this time obtained, a death sentence in his second capital trial. This death sentence

violated the Double Jeopardy Clause of the Fifth Amendment. *Bullington v. Missouri*, 451 U.S. 430 (1981).

Pennsylvania law places upon the prosecution the burden of persuading all twelve capital sentencing jurors that death is the appropriate punishment. If the jury unanimously agrees on a sentence – whether it is life or death – the court must impose the jury's verdict. Whenever the jury is unable to reach a unanimous verdict, the prosecution has failed to meet its burden of persuasion. When that occurs, as it did in Petitioner's initial capital trial, Pennsylvania law mandates that the trial court discharge the jury and impose a sentence of life imprisonment as a matter of law.

Because this type of jury deadlock actually results in the imposition of a sentence, the case fundamentally differs from those in which a jury deadlock on the question of guilt or sentencing produces a "hung jury." In the former, the trial proceedings are finally determined; in the latter, the "hung jury" prematurely terminates the trial proceedings without any final resolution. As a result of this factual and legal distinction, long-established principles of double jeopardy, due process, and fundamental fairness apply to the retrial of a life-sentenced defendant that are inapplicable in the context of a "hung jury" mistrial. When Pennsylvania capitally retried Petitioner and sought and obtained a sentence of death, that death-after-life sentence violated the Fifth and Fourteenth Amendments.

Pennsylvania's capital sentencing hearings are trial-like proceedings on the issue of punishment that are materially indistinguishable from those of the Missouri and Arizona death penalty statutes to which this Court has held jeopardy attaches. *Bullington*; *Arizona v. Rumsey*,

467 U.S. 203 (1984). Consequently, when a Pennsylvania capital defendant receives a life sentence after a capital sentencing proceeding tried to completion, "requiring [him] to submit to a second, identical proceeding [is] tantamount to permitting a second prosecution of an acquitted defendant." *Schiro v. Farley*, 510 U.S. 222, 231 (1994).

Here, the prosecution presented evidence and argument that was insufficient to convince nine of twelve jurors that Petitioner should be sentenced to death. Because of the Commonwealth's failure of proof, the trial court imposed a life sentence as a matter of law. 42 PA. C.S. § 9711(c)(1)(v). Trial court rulings that the prosecution has failed, as a matter of law, to establish a defendant's guilt constitute acquittals for double jeopardy purposes. And regardless of how the final adjudication of Petitioner's first sentencing hearing is characterized, the fact remains that he was sentenced to death after obtaining a life sentence when initially placed in jeopardy. Subjecting him to successive capital prosecutions, including twice facing the hazards of a trial-like capital sentencing hearing tried to completion, violated double jeopardy. This Court should reverse Petitioner's death sentence and declare that a life sentence imposed by operation of law following a capital sentencing hearing that has been tried to completion implicates double jeopardy.

Similarly, when a state mandates certain capital sentencing procedures or establishes the right to particular appellate, post-conviction, or post-sentencing review in capital cases, it creates Fourteenth Amendment life and liberty interests in those procedures. *Hicks v. Oklahoma*, 447 U.S. 343 (1980); *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998); *Ford v. Wainwright*, 477

U.S. 399, 427-31 (1986) (O'Connor, J., concurring). Here, Pennsylvania enacted a capital sentencing scheme that provided three possible verdicts: a unanimous verdict of death; a unanimous verdict of life; and a sentence of life by operation of law as a result of the jury's inability to reach a unanimous verdict. The life sentence that is the product of these procedures is final and unappealable by either side.

These procedures are an integral part of Pennsylvania's system for finally adjudicating whether a capital defendant will live or be sentenced to die. This and the unmistakably mandatory character of Pennsylvania's capital sentencing provisions create a substantial and legitimate expectation that a capital defendant who receives a judicially-imposed directed verdict for life resulting from a jury deadlock will not be subject to execution for his offense. Further, Pennsylvania makes no statutory distinction between the treatment of life sentences imposed by judicially directed verdicts and those imposed by unanimous juries in the event the defendant successfully appeals his conviction. Nor did it advise the sentencing jury or Petitioner that a successful appeal could jeopardize its non-unanimous verdict and his life sentence. These factors further strengthen the expectation that Pennsylvania would respect the life sentence that was mandated by its sentencing laws.

Pennsylvania was not constitutionally required to impose a directed life verdict when its capital sentencing juries deadlock, but having chosen this approach, it created a constitutionally protected life and liberty interest in the resulting life sentence. Pennsylvania may not arbitrarily deny Petitioner the life sentence mandated by its laws. This Court should reverse Petitioner's death sentence, and enforce his life and liberty interest in the

directed life verdict that was mandated by Pennsylvania's capital sentencing statute.

ARGUMENT

I. The Capital Retrial of David Sattazahn after His First Capital Sentencing Proceeding Resulted in the Imposition of a Life Sentence by Operation of Law Violated His Federal Constitutional Right to Be Free from Double Jeopardy.

David Sattazahn received a life sentence after a capital trial and sentencing proceeding, tried to completion in 1991. After reversal of his original conviction, Pennsylvania once again sought, and this time obtained, a death sentence in his second capital trial.

After Petitioner was convicted of first degree murder in his original trial, the case proceeded – per Pennsylvania law – to a second evidentiary proceeding. That proceeding was governed by title 42, section 9711 of the Pennsylvania Criminal Code. The capital sentencing statute guided the discretion of Petitioner's capital sentencer in deciding between the sentencing options of life without parole or death by providing detailed statutory standards defining aggravating and mitigating circumstances, establishing evidentiary requirements and burdens of proof applicable to these circumstances, and carefully setting forth the circumstances in which each of the alternative sentences may be imposed.

Pennsylvania's capital sentencing statute provides for two – and only two – sentencing options: life without possibility of parole or death. In seeking death, the

Commonwealth is required to prove one or more statutorily enumerated aggravating circumstances beyond a reasonable doubt.[5] When a jury is empaneled as the capital sentencer, it must unanimously agree that the Commonwealth has proven an aggravating circumstance before the jury may weigh that particular circumstance in its sentencing determination. On the other hand, a capital defendant is permitted to present any statutorily enumerated or constitutionally recognized mitigating circumstance[6] and must prove each circumstance by a preponderance of the evidence. The jury is required to weigh all mitigating circumstances found by any one or more of the jurors. 42 PA. C.S. § 9711(c)(1)(iii).

The capital sentencing statute also affords a capital defendant "a 'presumption of life'" in the penalty phase of trial. *Commonwealth v. Travaglia*, 502 Pa. 474, 499, 467 A.2d 288, 300 (1983). In so doing, it places the burden of persuasion on the prosecution such that death may not be imposed unless the capital sentencer has unanimously determined beyond a reasonable doubt that at least one aggravating circumstance exists and, even then, death may not be imposed unless the defendant has failed to prove any mitigating circumstances or if the aggravating circumstance(s) outweigh the mitigating circumstance(s) found. 42 PA. C.S. § 9711(c)(1)(iv)-(v); *Blystone v. Pennsylvania*, 494 U.S. 299, 305 (1990).[7] When the defendant is

[5] The aggravating circumstances are set forth in 42 PA. C.S. § 9711(d).

[6] The statutorily enumerated mitigating circumstances are set forth in 42 PA. C.S. § 9711(e).

[7] *See also Commonwealth v. Baker*, 531 Pa. 541, 569, 614 A. 2d 663, 677 (1992) (Pennsylvania's death penalty "statute . . . decides a 'tie,' and equal balance of aggravation and mitigation, in favor of the defense.").

tried before a sentencing jury, the statute places upon the prosecution the burden of persuading all twelve capital sentencing jurors that death is the appropriate punishment. The prosecution meets its burden of persuasion only when the jury has reached a unanimous verdict of death. In all other circumstances, state law mandates the imposition of a sentence of life without possibility of parole. 42 PA. C.S. § 9711(c)(1)(iv).

Pennsylvania also has adopted formal procedures for imposing sentence following the presentation of evidence and the jury's deliberations. Under Pennsylvania law, the court imposes the jury's verdict whenever the jury unanimously agrees upon a sentence. However, when the trial court determines that the sentencing jury cannot reach a unanimous verdict, Pennsylvania law requires that the trial court impose a sentence of life imprisonment as a matter of law. 42 PA. C.S. § 9711(c)(1)(v).

At the close of a capital sentencing jury trial in Pennsylvania, the jury is instructed in the applicable burdens of proof and persuasion. The instructions explain the combination of factfindings that may result in the imposition of sentence by a unanimous jury. The jury is also specifically instructed that, if it is not able to reach a unanimous verdict, the court will impose a life sentence. 42 PA. C.S. § 9711(c)(1). The jury is also provided a *First Degree Murder Sentencing Verdict Slip*, which it is instructed to read before beginning its deliberations. The verdict slip informs the jury in bold capitalized letters:

> **IF, AFTER SUFFICIENT DELIBERATION, YOU CANNOT UNANIMOUSLY REACH A SENTENCING VERDICT, DO NOT COMPLETE OR SIGN THIS SLIP, BUT RETURN IT TO THE JUDGE. THE JUDGE WILL**

DETERMINE IF FURTHER DELIBERATIONS ARE REQUIRED; IF THEY ARE NOT, THE JUDGE WILL SENTENCE THE DEFENDANT TO LIFE IMPRISONMENT.

PA. R. CRIM. P. 358A (subsequently renumbered as PA. R. CRIM. P. 807); *see* J.A. at 27.

In Petitioner's 1991 trial, the Commonwealth introduced evidence of a single aggravating circumstance – murder during the perpetration of a felony (robbery) – and Petitioner presented mitigating evidence of his lack of any significant history of prior criminal convictions and his age at the time of the crime. *Commonwealth v. Sattazahn*, 563 Pa. 533, 539, 763 A.2d 359, 362 (2000); J.A. at 92; *Verdict Slip* at 1; J.A. at 26-27. Following the presentation of evidence and argument by both sides, the trial court instructed the jury as required by Pennsylvania law, including an instruction that the court was legally required to impose a sentence of life imprisonment if the jury could not reach a unanimous verdict of either life or death. Record, N.T. 5/10/91, at 55-60; J.A. at 15-20.

The trial court also provided the jury with a verdict slip containing the language specified by Rule 358A (see above), and instructed the jury on the use of the verdict slip during its deliberations. Record, N.T. 5/10/91, at 58-60; J.A. at 18-19. After the jury reported that it was "hopelessly deadlocked at 9-3 in favor of life imprisonment" with the jurors "deeply entrenched in their position," Record, N.T. 5/10/91, at 67, Court Exh. 4; J.A. at 25, the trial court discharged the jury pursuant to 42 PA. C.S. § 9711(c)(1)(v) and imposed the statutorily mandated directed verdict of life imprisonment. Record, N.T. 5/10/91, at 63-64; J.A. at 23-24.

The trial court subsequently advised Petitioner that he had a right to appeal his conviction, but did not ever inform Petitioner of the possibility that a successful appeal of his homicide conviction could subject him to a second capital prosecution. Petitioner then appealed his homicide and robbery convictions, and the Pennsylvania Superior Court overturned those convictions on July 30, 1993. Several months later, in *Commonwealth v. Martorano*, 535 Pa. 178, 634 A.2d 1063 (1993), the Pennsylvania Supreme Court held for the first time that a directed verdict of life imposed by the trial court after a capital sentencing jury could not reach a unanimous verdict did not constitute an acquittal of death and so did not implicate double jeopardy.

After the Pennsylvania Supreme Court declined to review Petitioner's successful appeal, the prosecution provided notice of its intention to seek death a second time. The state courts – alluding to "the remote risk of a death sentence upon retrial," Pretrial Opinion at 1; J.A. at 54 – rejected Petitioner's pre-trial efforts to quash the capital reprosecution. Given this second opportunity to obtain a death verdict, the case proceeded to a second capital sentencing hearing and this time Petitioner was sentenced to death.

Mr. Sattazahn's death-after-life sentence must be reversed, for Pennsylvania subjected him "to be twice put in jeopardy of life" for the same offence. U.S. CONST. Amend. 5.

A State violates the Double Jeopardy Clause of the Fifth Amendment when it subjects a defendant who received a life sentence in his original capital sentencing trial to a capital retrial and death sentence after reversal of his original conviction. *Bullington v. Missouri*, 451 U.S.

430 (1981) (double jeopardy where jury had sentenced capital defendant to life imprisonment after trial-like capital sentencing proceeding); *Arizona v. Rumsey*, 467 U.S. 203 (1984) (double jeopardy where, after trial-like capital sentencing proceeding, trial judge sentenced capital defendant to life based upon erroneous view that the evidence did not support any aggravating circumstances). As this Court has clearly explained, "the Double Jeopardy Clause applies to . . . *capital sentencing proceeding[s]*" and bars imposition of the death penalty on retrial whenever "an initial conviction, set aside on appeal, *has resulted in rejection of the death sentence*." *Rumsey*, 467 U.S. at 209. Double jeopardy applies because when a capital defendant receives a life sentence after a "capital sentencing proceeding [that] 'was itself a trial on the issue of punishment,' requiring [him] to submit to a second, identical proceeding [is] tantamount to permitting a second prosecution of an acquitted defendant." *Schiro v. Farley*, 510 U.S. 222 (1994) (quoting and citing *Bullington*).[8]

The double jeopardy violation in this case is evident from a comparison between Pennsylvania's capital sentencing proceedings and those of the other states whose capital sentencing proceedings this Court has held implicate the Double Jeopardy Clause. Simply put, Pennsylvania's capital sentencing proceedings are indistinguishable for double

[8] *Cf. Poland v. Arizona*, 476 U.S. 147 (1986) (no double jeopardy where trial judge sentenced capital defendant to death based upon finding of a single aggravating circumstance that was not supported by the evidence when death sentence could have been supported by another aggravating circumstance that the trial court erroneously believed was not present; double jeopardy *would have attached* if court's error had resulted in a life sentence).

jeopardy purposes from those in *Bullington* (Missouri) and *Rumsey* (Arizona).

- As in Arizona and Missouri, the capital sentencer is faced with a choice of only two sentencing options. In Arizona, the capital sentencer was required to choose between death or the sentencing alternative of life without possibility of parole for 25 years; in Missouri, death or the sentencing alternative of life without possibility of release for 50 years; and in Pennsylvania, death or the sentencing alternative of life without the possibility of parole.

- In all three states, the sentencer must make this decision guided by detailed statutory standards defining aggravating and mitigating circumstances, based upon evidence introduced in a separate proceeding that has all the formal elements of a trial.

- All three sentencing statutes require proof of aggravating circumstances beyond a reasonable doubt, pursuant to procedures governing the admissibility of evidence.

- All three statutes identify those circumstances in which a death sentence may be imposed and in which a life sentence may be imposed.

Rumsey, 467 U.S. at 209-10; *Bullington*, 451 U.S. at 432-35; 42 PA. C.S. § 9711; 42 PA. C.S. § 9756(c); 61 PA. C.S. § 331.21.[9] As in Missouri, any jury decision to impose the

[9] "That the sentencer in [Pennsylvania when a jury deadlocks] is the trial judge rather than the jury does not render the sentencing

(Continued on following page)

death penalty must be unanimous; and if the jury cannot agree on a sentence, the defendant is sentenced to life imprisonment by operation of law. *Bullington*, 451 U.S. at 434-35; 42 PA. C.S. § 9711(c)(1)(iv)-(v).

"For these reasons, when the Missouri" or Arizona or Pennsylvania "sentencer imposes a sentence of life imprisonment in a capital sentencing proceeding, it has determined that the prosecution has failed to prove its case." *Rumsey*, 467 U.S. at 209. Because "the anxiety and ordeal suffered by a defendant in Missouri's" and Arizona's and Pennsylvania's "capital sentencing proceeding are the equal of those suffered in a trial on the issue of guilt, . . . the Double Jeopardy Clause prohibits the State from resentencing the defendant to death after the sentencer has in effect acquitted the defendant of that penalty." *Id.*

In short, as this Court explained:

> [A] sentence imposed after a completed Arizona [or Pennsylvania] capital sentencing hearing is a judgment like the sentence at issue in Bullington v. Missouri, which this Court held triggers the protections of the Double Jeopardy Clause.
>
> The double jeopardy principle relevant to respondent's case is the same as that invoked in Bullington: an acquittal on the merits by the sole decisionmaker in the proceeding is final and bars retrial on the same charge. Application of the Bullington principle renders respondent's death sentence a violation of the Double Jeopardy Clause because respondent's initial sentence of

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proceeding any less like a trial," nor does the fact that "no appeal need be taken if life imprisonment is imposed." *Rumsey*, 467 U.S. at 210.

> life imprisonment was undoubtedly an acquittal on the merits of the central issue in the proceeding – whether death was the appropriate punishment for respondent's offense. . . . [A]s required by state law, the court then entered judgment in respondent's favor on the issue of death. That judgment, based on findings sufficient to establish legal entitlement to the life sentence, amounts to an acquittal on the merits and, as such, bars any retrial of the appropriateness of the death penalty.

Rumsey, 467 U.S. at 210-11; *see Green v. United States*, 355 U.S. 184, 190-91 (1957) (conviction of defendant for second degree murder was an implied acquittal of accompanying charges of first degree murder, and double jeopardy barred retrial for first degree murder when conviction was reversed on appeal).

In *Sattazahn* and *Martorano*, however, the Pennsylvania Supreme Court held that the Fifth Amendment's double jeopardy protections attach whenever a final, unappealable judgment of life is imposed by operation of the state-law mechanism of a unanimous jury verdict but not when a final, unappealable judgment of life is imposed by operation of the state-law mechanism of a directed verdict of life by the trial judge following a jury deadlock on sentencing. *Sattazahn*, 563 Pa. at 547-49, 763 A.2d at 367-68; J.A. at 102-04; *Martorano*, 535 Pa. at 188, 634 A.2d at 1067-68. This cramped interpretation of the Fifth Amendment elevates form over substance and badly misapprehends this Court's decisions on double jeopardy. This Court's precedents establish that double jeopardy attaches whenever a capital defendant is subjected to trial-like capital sentencing proceedings, tried to completion, and the sentencing proceedings terminate with the

imposition of a sentence other than death. *Bullington*, *Rumsey*, *supra*.

Here, David Sattazahn's legal entitlement to the life sentence he received in his first capital sentencing proceeding is beyond question. The State presented evidence that persuaded only three jurors that death was the appropriate penalty. The evidence and argument it presented was not, however, weighty or convincing enough to persuade the other nine jurors to impose death. As a result of the prosecution's failure to meet its burden of persuasion, the trial court sentenced Petitioner to life imprisonment.

Pennsylvania's erroneous death-after-life double jeopardy jurisprudence entirely ignores the trial-like nature of the Commonwealth's capital sentencing proceeding and the constitutional consequences produced by the termination of capital jeopardy that results when such a proceeding is tried to completion. Instead, Pennsylvania colloquially misdescribes a deadlocked capital sentencing jury as a "hung jury," and then misascribes the very different double jeopardy consequences of a hung jury to the termination of jeopardy produced by a non-unanimous capital sentencing jury under Pennsylvania law. But in fact and law under Pennsylvania's capital sentencing scheme, a non-unanimous capital sentencing jury is not a "hung jury" that prematurely terminates the trial proceedings without any final resolution of the case. The jury is discharged, but this does not produce a mistrial. On the contrary, the legislature specifically envisioned that a capital sentencing trial might produce a divided jury that could not agree on the appropriate sentence. It dealt with that possibility by requiring the court to impose a life sentence as a matter of law.

This distinction makes a difference. The typical hung jury produces no legal judgment. Instead, it produces a mistrial that does not determine the outcome of the trial. This is not an acquittal and does not terminate the case. *United States v. Perez*, 9 U.S. (Wheat) 579, 580 (1824). On the other hand, when a trial court enters a directed verdict for the defendant after discharging a deadlocked jury, that directed verdict constitutes a judgment of acquittal that "act[s] to terminate a trial in which jeopardy has long since attached." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 570 (1977). Once acquitted, whether by a jury or the court, "subjecting the defendant to postacquittal factfinding proceedings going to guilt or innocence violates the Double Jeopardy Clause." *Smalis v. Pennsylvania*, 476 U.S. 140, 145 (1986) (citing *Arizona v. Rumsey*, 467 U.S. 203, 211-12 (1984)).

Pennsylvania law mandates that, if the jury cannot reach a unanimous verdict after consideration of the evidence on the issue of whether the defendant should live or die, "the court shall sentence the defendant to life imprisonment." 42 PA. C.S. § 9711(c)(1)(v). It necessarily follows that:

> such a judgment of acquittal plainly concludes a pending prosecution in which jeopardy has attached, following the introduction at trial of evidence on the general issue. In that circumstance we hold that "although retrial is sometimes permissible after a mistrial is declared but no verdict or judgment has been entered, the verdict of acquittal foreclosed retrial and thus barred appellate review."

Martin Linen, 430 U.S. at 576 (quoting *United States v. Wilson*, 420 U.S. 332, 348 (1975)).

The discharge of a non-unanimous capital-sentencing jury in Pennsylvania does not produce a mistrial without final judgment. Quite the opposite. It produces an unappealable directed verdict of life imprisonment that terminates the capital sentencing trial. This judicially imposed life sentence is an acquittal of death that triggers double jeopardy protections.[10]

The Pennsylvania Supreme Court's holding that the issuance of a statutorily mandated "default judgment" for life following discharge of a non-unanimous jury "is not sufficient to establish legal entitlement to a life sentence" for double jeopardy purposes because the judge who imposed the life sentence has "ma[de] no findings and resolve[d] no factual matter," *Sattazahn*, 563 Pa. at 548, 763 A.2d at 367; J.A. at 103; *Martorano*, 535 Pa. at 194, 634 A.2d at 1070, is similarly unfounded. A defendant need

[10] The Pennsylvania Supreme Court's interpretation of the federal double jeopardy doctrine in this case is reminiscent of its interpretation of federal double jeopardy doctrine in *Smalis v. Pennsylvania*, 476 U.S. 140 (1986), and is erroneous for the same reasons. Here, as in *Smalis*, the court ruled that a trial court's entry of judgment for the defendant *as a matter of law* (a directed verdict in this case; in *Smalis*, a demurrer) "is not a factual determination" and therefore "is not the functional equivalent of an acquittal." *Smalis*, 476 U.S. at 143. This Court explained that a demurrer – which enters judgment for the defendant as a matter of law when the evidence was insufficient to permit a conviction – "is an acquittal under the Double Jeopardy Clause." *Id.* at 144. Similarly, here, a directed life verdict – which enters judgment for the defendant as a matter of law when the prosecution's evidence was insufficient to permit a death sentence because the prosecution has not met its burden of persuading all twelve jurors that death is the appropriate punishment – also is an acquittal under the Double Jeopardy Clause. Indeed, *Smalis* makes clear that even an erroneous ruling of law that results in the imposition of a life sentence in a capital sentencing proceeding amounts to an acquittal of death for double jeopardy purposes. *Id.* at 145 n.8.

not establish his factual innocence of death to demonstrate his "legal entitlement to a life sentence" any more than he must establish factual innocence of an offense to be legally entitled to a guilt-stage acquittal. Where the state has the burden of persuasion on the issue of death, a defendant need only show that the state has failed to carry its burden by failing to persuade.

As described above, a jury's failure to unanimously agree that death should be imposed amounts to a decision, by operation of Pennsylvania law, that death is *not* the appropriate punishment. Pennsylvania law explicitly states that a death sentence is permissible only when (1) the sentencing jury unanimously agrees both that the state has proven one or more aggravating circumstances and that the defendant has proven no mitigating circumstances; or (2) the sentencing jury unanimously agrees that the aggravating circumstance(s) that all jurors have found to exist outweigh the combination of mitigating circumstances that any of the jurors have found to exist. When this does not occur, either because the weighing process has produced a unanimous life verdict or because the jurors cannot reach unanimity, the defendant is legally entitled to a life sentence.

Likewise, the trial court is not required to make any specific factfindings as to the existence of aggravating and mitigating circumstances or their relative weight before imposing a life sentence. The only facts that the court must find to establish a defendant's legal entitlement to a life sentence are that the sentencing jury is not unanimous and that the non-unanimous jury is deadlocked. *Sattazahn*, 563 Pa. at 548, 763 A.2d at 367; J.A. at 103 ("Under Pennsylvania's sentencing scheme, the judge has no discretion to fashion sentence once he finds that the jury is

deadlocked. The statute directs him to enter a life sentence."). The consequences of that deadlock – that the Commonwealth has failed to muster evidence sufficient to convince the jury to impose death – mandates "enter[ing] an 'acquittal,' i.e., a life sentence." *Smalis*, 476 U.S. at 145 n.8. At that point, "the Double Jeopardy Clause bar[s] a second sentencing hearing." *Id.*

As set forth above, the decisions of Pennsylvania's supreme court assert that double jeopardy attached in *Bullington* only because the acquittal of death by the sentencing jury in that case was unanimous. They assert that double jeopardy attached in *Rumsey* because of the nature of the trial court's factfinding, rather than the nature of the trial court's judgment.[11] But this Court has

[11] The Pennsylvania Supreme Court misreads *Rumsey* as requiring a specific factfinding of aggravating and mitigating circumstances that could legally support no sentence other than life before the resulting judgment could amount to an acquittal on the merits. But *Rumsey* said no such thing. It said, "as required by state law, the court then *entered judgment in respondent's favor* on the issue of death. That judgment . . . amounts to an acquittal on the merits and, as such, bars any retrial of the appropriateness of the death penalty." *Rumsey*, 467 U.S. at 211. The Court, per Justice O'Connor, indicated in a subordinate clause that the judgment in that particular case had been "based on findings sufficient to establish legal entitlement to the life sentence," *id.*, but did not say – as Pennsylvania erroneously contends – that the judgment could not amount to an acquittal on the merits *unless* it was based on findings sufficient to establish legal entitlement to the life sentence. This Court has consistently held that *any* judgment in the defendant's favor – even one that is based on erroneous factfinding that (but for the error) would be insufficient to establish legal entitlement to a life sentence or guilt-stage acquittal – implicates double jeopardy and bars retrial. In this case, the trial judge, "as required by state law," entered a directed verdict of life that constituted a "judgment in respondent's favor on the issue of death." That judgment – even though produced by a jury deadlock, "amounts to an acquittal on the merits and, as such, bars any retrial of the appropriateness of the death penalty."

never read either case that way. This Court's conception of an "acquittal" of death is the imposition of a life sentence after a trial-like proceeding tried to completion. *Schiro v. Farley*, 510 U.S. 222, 232 (1994); *Poland v. Arizona*, 476 U.S. 147, 152 (1986); *Smalis v. Pennsylvania*, 476 U.S. 140, 145 n.8 (1986); *Arizona v. Rumsey*, 467 U.S. 203, 211 (1984); *Bullington v. Missouri*, 451 U.S. 430, 445-46 (1981).

Bullington turned on the procedural requirements that made Missouri's capital sentencing proceeding trial-like, 451 U.S. at 433-35, and repeatedly stressed that the binary choice of sentences resulting from those proceedings – either life or death[12] – would determine whether the prosecution had proven its case for death, *id.* at 444-45. Moreover, the Court expressly included among its description of the "substantive standards" and "procedural protections" that qualified Missouri life sentences for double jeopardy protection that "[i]f the jury is unable to agree, the defendant receives the alternative sentence of life imprisonment." *Id.* at 435.

Thus, as described earlier, "the Double Jeopardy Clause applies to Missouri's *capital sentencing proceeding*" – not just to a unanimous jury verdict – and bars imposition of the death penalty on retrial whenever "an initial conviction, set aside on appeal, *has resulted in rejection of the death sentence*." *Rumsey*, 467 U.S. at 209. It similarly

[12] *Bullington*, 451 U.S. at 432 ("Missouri law provides two, and only two, possible sentences for a defendant convicted of capital murder: (a) death, or (b) life imprisonment without eligibility for probation or parole for 50 years."); *id.* at 440 ("Bullington's Missouri jury was given – and under the State's statutes could be given – only two choices, death or life imprisonment.").

applies to Arizona's capital sentencing proceeding, *id.* at 209-10; *Poland v. Arizona*, 476 U.S. 147, 154 n.4 (1986), and to Pennsylvania's.

Furthermore, the historic policies underlying the Double Jeopardy Clause make clear that the Fifth Amendment's double jeopardy protections attached when Petitioner's first penalty phase was tried to completion and produced a final judgment of life – whether or not that life verdict is denominated an "acquittal."

> The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding. *This is central to the objective of the prohibition against successive trials.* The Clause does not allow "the State . . . to make repeated attempts to convict an individual for an alleged offense," since "[t]he constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense." *Green v. United States*, 355 U.S. 184, 187 (1957); see *Serfass v. United States*, 420 U.S. 377, 387-388 (1975); *United States v. Jorn*, 400 U.S. 470, 479 (1971).

Burks v. United States, 437 U.S. 1, 11 (1978) (footnote and parallel citations omitted); *United States v. DiFrancesco*, 449 U.S. 117, 136 (1980).

This Court has held that the values that underlie this central principle of double jeopardy jurisprudence "are equally applicable when a jury has rejected the State's claim that the defendant deserves to die." *Bullington*, 451 U.S. at 445.

> The "embarrassment, expense and ordeal" and the "anxiety and insecurity" faced by a defendant at the penalty phase of a Missouri capital murder trial surely are at least equivalent to that faced by any defendant at the guilt phase of a criminal trial. The "unacceptably high risk that the [prosecution], with its superior resources, would wear down a defendant," id., at 130, 101 S.Ct., at 433, thereby leading to an erroneously imposed death sentence, would exist if the State were to have a further opportunity to convince a jury to impose the ultimate punishment.

Bullington, 451 U.S. at 445. All of these factors are presented whenever a State seeks a death-after-life sentence: the "embarrassment, expense and ordeal"; the "anxiety and insecurity"; the unacceptably high risk that the prosecution's superior resources will wear a defendant[13] down, are not affected by the formal mechanism by which the final judgment of life is entered. They are equally applicable when a judge has rejected the State's claim that the defendant deserves to die, *e.g.*, *Rumsey*, and when, as in this case, state law has rejected death by requiring the judge to direct a life verdict after the prosecution has failed to meet its burden of persuasion.

The prosecution is unquestionably entitled to "one fair opportunity" to obtain a capital conviction, *Bullington*, 451 U.S. at 442 (quoting *Burks*), but the Double Jeopardy Clause *limits* the prosecution to one fair opportunity. Where jeopardy of death has attached, a trial-like capital sentencing hearing has been tried to completion, and a final judgment of life has been entered, the defendant's

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[13] And particularly, as here, an indigent defendant.

jeopardy of death has terminated and, if he successfully appeals the underlying conviction, he may not be subjected to a second jeopardy of death.

This Court's November 1994 decision in *Schiro v. Farley*, 510 U.S. 222 (1994) eliminates any possible doubt as to the applicability of the Fifth Amendment's double jeopardy protections to Petitioner's second capital sentencing trial. Under double jeopardy, this Court wrote, "*the primary evil to be guarded against is successive prosecutions*: '[T]he prohibition against multiple trials is the controlling constitutional principle.'" *Id.* at 230 (quoting *United States v. DiFrancesco*, 449 U.S. 117, 132 (1980)). Thus, this Court explained in language that could not be much clearer, the "one fair opportunity" *Bullington* affords to prosecute a defendant "extends not only to prosecution at the guilt phase, but also to present evidence at an ensuing sentencing proceeding"; *Bullington* establishes a double jeopardy "prohibition *against a second capital sentencing proceeding*." *Id.* at 230. The Court unequivocally declared that a "capital sentencing proceeding '[is] itself a trial on the issue of punishment,'" and that "requiring a defendant to submit to a second, identical proceeding [would be] tantamount to permitting a second prosecution of an acquitted defendant." *Id.* at 232.

The Commonwealth of Pennsylvania was afforded a fair opportunity to present evidence against Petitioner in the capital sentencing proceedings in his first trial. The capital sentencing jury in that trial was not unanimously persuaded that he should be sentenced to death: on the contrary, three-quarters of the jurors believed that Petitioner should be sentenced to life imprisonment. Because the jury was unable to reach a unanimous sentencing verdict, the Pennsylvania capital sentencing statute

required the trial court to impose a life sentence as a matter of law. Pursuant to that law, the court directed a verdict of life imprisonment and entered a final sentence of life without possibility of parole. Petitioner's capital retrial after successfully challenging his unconstitutional conviction "was tantamount to permitting a second prosecution of an acquitted defendant," *Schiro*, 510 U.S. at 232, and was barred by double jeopardy.

The capital sentencing jury in Petitioner's first trial could not properly have returned – and the Commonwealth of Pennsylvania could not have imposed – a death verdict so long as the prosecution had failed to persuade any of the sentencing jurors (let alone nine of twelve) that death was the appropriate punishment.

> Since we necessarily afford absolute finality to a jury's verdict of acquittal – no matter how erroneous its decision – it is difficult to conceive how society has any greater interest in retrying a defendant when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty.

Bullington, 451 U.S. at 442-43 (quoting *Burks*, 437 U.S. at 16); *Poland v. Arizona*, 476 U.S. at 153 n.2 (same).

David Sattazahn was sentenced to death after obtaining a life sentence when initially placed in jeopardy. Subjecting him to successive capital prosecutions, including twice facing the hazards of a capital sentencing hearing, violated double jeopardy. His death sentence must be vacated, and Pennsylvania forever barred from seeking death in his case.

II. The Capital Retrial of David Sattazahn after His First Capital Sentencing Proceeding Resulted in the Imposition of a Life Sentence by Operation of 42 Pa. C.S. § 9711(c)(1)(v) Violated His Due Process Life and Liberty Interest in the Sentence Mandated by Pennsylvania's Death Penalty Statute.

When a state mandates certain capital sentencing procedures or establishes the right to particular appellate, post-conviction, or post-sentencing review in capital cases, it creates Fourteenth Amendment life and liberty interests in those procedures. *Evitts v. Lucey*, 469 U.S. 387, 393 (1985) (due process interest in state created right to direct appeal); *see Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980) (liberty interest in state-created capital sentencing procedures); *Ford v. Wainwright*, 477 U.S. 399, 427-31 (1986) (O'Connor, J., concurring) (the "conclusion . . . is inescapable that Florida positive law has created a protected liberty interest in avoiding execution while incompetent"); *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 288-89 (1998) (O'Connor, J, with Souter, Ginsburg & Breyer, JJ., concurring) (life interest in state-created right to capital clemency proceedings); *id.* at 291-92 (Stevens, J., concurring) (life interest in commutation procedures "abundantly clear"). Although the right to the particular procedure is established by state law, the violation of the life and liberty interest it creates is governed by *federal* constitutional law. *Hicks*, 447 U.S. at 346; *Ford*, 477 U.S. at 428-29; *see Evitts*, 469 U.S. at 393.

This Court's liberty interest jurisprudence has stressed several principles that compel its application to Pennsylvania's mandatory imposition of a life sentence resulting from a non-unanimous capital sentencing verdict. First, the

Court's cases "leave no doubt that where a statute indicates with 'language of an unmistakable mandatory character,' that state conduct injurious to an individual will not occur 'absent specified substantive predicates,' the statute creates an expectation protected by the Due Process Clause." *Ford v. Wainwright*, 477 U.S. at 428 (O'Connor, J., concurring) (citations omitted). Second, the Court has specifically determined that constitutional liberty interests are vested in a defendant when the State employs particular procedures "as 'an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant.'" *Evitts*, 469 U.S. at 393. The process by which a defendant's sentence is imposed is an integral part of that system, even in non-capital cases. In capital cases, it *embodies* the system of finally adjudicating life or death. As a result, a defendant "has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the [sentencer] in the exercise of its statutory discretion, and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State." *Hicks*, 447 U.S. at 346. Arbitrarily denying a defendant the "sentence to which he was entitled under state law, . . . is a denial of due process." *Id.*[14]

As described earlier, Pennsylvania's sentencing statute specifies two circumstances in which a death sentence may be imposed and mandates that "[t]he verdict must be a sentence of life imprisonment in all other cases."

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[14] While *Hicks* involved jury sentencing, it is beyond question that the substantiality and legitimacy of a defendant's expectation in the sentence "to which he [is] entitled under state law" remains the same whether he is sentenced by a jury or by the court.

42 PA. C.S. § 9711(c)(1)(iv). It further mandates that the court "shall sentence the defendant to life imprisonment" if it determines that the jury is unable to reach a unanimous verdict. 42 PA. C.S. § 9711(c)(1)(v).[15] The life sentence that results from these procedures is final and unappealable by either side.

Pennsylvania also requires both that the trial court instruct the jury as to the legal consequences of its failure to reach a verdict, 42 PA. C.S. § 9711(c)(1), and provide the capital sentencing jury a verdict slip that specifically explains that "the judge will sentence the defendant to life imprisonment," PA. R. CRIM. P. 358A (capitalization and emphasis omitted), if the jury cannot reach a unanimous verdict. As a result, sentencing juries know from the outset of deliberations that by disagreeing on the applicable sentence, the defendant will receive a life sentence. The jury in Petitioner's initial trial was provided and read this verdict slip, and knew that when it could not reach a unanimous verdict Petitioner would be sentenced to life.[16]

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[15] The Pennsylvania courts have recognized the mandatory character of the trial court's sentencing obligation. *Commonwealth v. Sattazahn*, 563 Pa. at 539, 763 A.2d at 362; J.A. at 92 (court "entered a mandatory life sentence" under subsection (c)(1)(v)); *Jones*, 546 Pa. at 199, 683 A.2d at 1199 ("subsection (c)(1)(v) . . . mandates that a court impose a life sentence where the jury is unable to reach a unanimous agreement"); *Martorano*, 535 Pa. at 194, 634 A.2d at 1070 (1993) (once judge finds that the jury is deadlocked, "[t]he statute directs him to enter a life sentence").

[16] This instruction creates a substantial and legitimate expectation *in the jury* as well as in the defendant that, in the event of a jury deadlock, the defendant will be sentenced to life. This removes the incentive for jurors who favor life to try to convince death-leaning jurors to reach a unanimous verdict because the jurors know the ultimate sentence will remain the same whether the verdict for life is 12-0 or, in

(Continued on following page)

There can be no debate as to whether the discharge of a non-unanimous capital sentencing jury under 42 PA. C.S. § 9711(c)(1)(v) actually produces a "sentence to which [a defendant is] entitled under state law." *Hicks*, 447 U.S. at 346. The procedures are statutorily delineated; their character is unmistakably mandatory. *Ford v. Wainwright*, 477 U.S. at 428 (O'Connor, J., concurring). They are an integral part of Pennsylvania's system for finally adjudicating whether a capital defendant will live or be sentenced to die. The Commonwealth cannot seek to empanel a new jury or to appeal the sentence. And the defendant, as verdict winner, has no basis or need to appeal. By establishing sentencing procedures that require the imposition of a life sentence whenever a capital sentencing jury does not unanimously agree to impose death, and requiring the judicial imposition of a life sentence when the jury cannot agree on a sentence, Pennsylvania created a substantial and legitimate expectation that a capital defendant who receives a judicially-imposed directed verdict for life resulting from a non-unanimous jury will not instead be subject to execution for his offense.

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this case, 9-3. Similarly, a death-leaning juror may hold out simply to make a point, even though he might ultimately have voted for life if he knew that deliberations would continue until the jury reached a unanimous decision.

Whereas both the defendant and the jury know that a deadlocked jury and a jury that is unanimous for life produce the same outcome, neither the defendant nor the jury has any notice that a non-unanimous verdict might possibly produce a "second-class" life verdict that could expose the defendant to a death sentence should he choose to appeal his conviction. In these circumstances, it is unfair to penalize the defendant – and a disservice is done to those jurors who would have pressed for unanimity – by *sub silentio* transforming the directed life verdict into a provisional life sentence.

That expectation is strengthened by two things Pennsylvania has not done, but which it would reasonably be expected to have done if it did not regard the directed life verdict as final. First, Pennsylvania makes no statutory distinction of any kind between the treatment of life sentences imposed by judicially directed verdicts and those imposed by unanimous juries, much less in the event the defendant successfully appeals his conviction. Second, Pennsylvania did not inform either the sentencing jury or Petitioner that a successful appeal could jeopardize a non-unanimous (but not a unanimous) life verdict and render Petitioner's life sentence a nullity. These omissions strengthen the already substantial and legitimate expectation that Pennsylvania would respect the life sentence that was mandated by its sentencing laws.

Pennsylvania was not constitutionally compelled to follow this approach.[17] Nonetheless, it chose to create this entitlement and did so in language of unmistakably mandatory character. Having done so, due process protects Petitioner from any arbitrary deprivation of the life sentence he received by operation of Pennsylvania law. *Hicks*, 447 U.S. at 346-47; *see also Ohio Adult Parole Authority v. Woodard*, 523 U.S. at 292-93 (Stevens, J., concurring) (same re: appellate and post-conviction remedies); *Ford*, 477 U.S. at 430-31 (O'Connor, J., concurring). Because Pennsylvania's statute, in the words of Justice Ginsburg, "does not provide for a second shot at death"

[17] Among numerous possible alternatives, the Commonwealth could have provided that a jury deadlock "would have resulted in impaneling a second jury," *United States v. Jones*, 2002 WL 464678 (5th Cir. March 27, 2002), or the empaneling of a three-judge panel to conduct a sentencing hearing and determine sentence, *e.g.*, NEV. REV. STAT. § 175.556 (West 2002).

following a deadlocked jury, *Jones v. United States*, 527 U.S. 373, 418 (1999) (Ginsburg, J., dissenting on other grounds), treating Petitioner as death-eligible and subjecting him to a second capital trial and a successive capital sentencing proceeding arbitrarily denies him this constitutionally protected right.

Perhaps if the life and liberty interests implicated in this case attached after conviction and sentencing, "the demands of due process [might be] reduced." *Woodard*, 523 U.S. 272, 288 (1998) (O'Connor, J., joined by Souter, Ginsburg & Breyer, JJ., concurring); *id.* at 290-94 (Stevens, J., concurring in part and dissenting in part).[18] But this is not such a case. Here, Pennsylvania had not "established its right to [capitally] punish"[19] David Sattazahn at the time his life and liberty interest attached in this case. Indeed, the outcome of David Sattazahn's first trial instead established that Pennsylvania was *disentitled* to capitally punish Petitioner, heightening rather than diminishing his expectation in a life sentence.

Moreover, David Sattazahn's *life* interest in full enforcement of the life sentence imposed at his first trial by operation of Pennsylvania law makes his due process interest even stronger than the liberty interests present in non-capital cases because the need for heightened reliability in capital sentencing adjudications requires more

[18] For example, *Ford v. Wainwright*, 477 U.S. 399 (1986) (liberty interest in not being executed while incompetent) and *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998) (life and liberty interest in executive clemency proceedings).

[19] *Woodard*, 523 U.S. at 288 (O'Connor, J., concurring) (quoting *Ford*, 447 U.S. at 429 (O'Connor, J., concurring in result)).

solicitous treatment by the Courts. As Justice Stevens has explained:

> The interest in life that is at stake in this case warrants even greater protection than the interests in liberty at stake in [non-capital] cases. For "death is a different kind of punishment from any other which may be imposed in this country. From the point of view of the defendant, it is different in both its severity and its finality .... From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." *Gardner v. Florida*, 430 U.S. 349, 357-58, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (1977) (citations omitted) (plurality opinion).

Woodard, 523 U.S. at 293-94.

Once Pennsylvania created the mandatory entitlement to a life sentence, it was not at liberty to retroactively rescind the right by subsequently approving a second capital trial for a defendant whose right to a mandatory life sentence had already vested. Subjecting Petitioner to a capital resentencing hearing and the resulting death sentence, when the Commonwealth had no basis or ability to challenge the life sentence he received in his original trial and when neither the sentencing statute nor the trial court gave Petitioner notice that a successful appeal of his conviction could have any possible implications

for that life sentence,[20] constituted an arbitrary denial of Petitioner's life and liberty interest in that life sentence. This Court should reverse Petitioner's death sentence, and enforce his life and liberty interest in the directed life verdict that was mandated by Pennsylvania's capital sentencing statute.

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[20] The record is devoid of any evidence that anyone at any time prior to overturning his conviction ever alerted Petitioner to the possibility that a successful appeal could place his life in jeopardy.

CONCLUSION

For all the foregoing reasons, this Court should reverse David Sattazahn's death-after-life sentence as having been imposed in violation of the Double Jeopardy Clause of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment. This Court should grant Petitioner relief and remand this case to the Supreme Court of Pennsylvania with directions to impose a sentence of life imprisonment.

Respectfully submitted,

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(6)

No. 01-7574

IN THE SUPREME COURT OF THE UNITED STATES

DAVID ALLEN SATTAZAHN,
Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF PENNSYLVANIA

RESPONDENT'S BRIEF

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CAPITAL CASE

QUESTIONS PRESENTED

I. Does the Double Jeopardy Clause of the Fifth Amendment bar imposition of the death penalty upon reconviction after an initial conviction, set aside on appeal, in which the trial court imposed a statutorily mandated life sentence when the capital sentencing jury failed to reach a unanimous verdict?

II. Whether a capital defendant's life and liberty interest in the mandatory imposition of a life sentence required by state law where the sentencing jury fails to reach a unanimous verdict was violated when the state sought the death sentence on retrial?

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42 Pa.C.S. § 9711(c)(1)(iv) 33

42 Pa.C.S. § 9711(c)(1)(v) 3, 14, 20, 34

42 Pa.C.S. § 9711(d)(6) 2, 5, 19

42 Pa.C.S. § 9711(d)(9) 4, 5

42 Pa.C.S. § 9711(h)(1) 5

Pa.R.A.P. 1112, 42 Pa.C.S. 4

Pa.R.Crim.P. 358A, 42 Pa.C.S. 33

Pa. R. Crim.P. 807, 42 Pa.C.S. 33

STATEMENT OF THE CASE

Petitioner, David Sattazahn, was arrested on July 17, 1989, and was charged with criminal homicide and related crimes in the shooting death, some two years earlier, of Richard Boyer, a restaurant manager, who was attacked as he left work, after the close of business, with the day's receipts contained in a bank deposit bag. In its prosecution of Sattazahn, the Commonwealth, the respondent in this Court, sought the death penalty.

The evidence presented at Sattazahn's jury trial before the Berks County Court of Common Pleas established that he and a co-defendant, Jeffrey Scott Hammer,[1] had, over the course of several week-ends leading up to the crime, engaged in surveillance of the restaurant managed by Richard Boyer. Hidden away in a clearing they had made in an nearby wooded area, they studied the restaurant's operation and routine, learning that the restaurant did the most business on Sundays and also that Boyer, who was the last person to leave the restaurant each night, brought with him a money bag when he left. Record, N.T., 5/6/91, 488-90, 501-03.

At approximately 11:00 p.m. on Sunday, April 12, 1987, Boyer came out of the restaurant carrying a bank deposit bag containing the day's receipts, closed the restaurant, and started walking toward his pickup truck parked outside. Sattazahn and Hammer, who had been in their hiding place in the wooded area for about an hour waiting to rob Boyer, suddenly emerged, and with guns drawn, confronted Boyer. Sattazahn,

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[1]Hammer was also charged in the killing of Richard Boyer and plead guilty to third degree murder, robbery and related charges for which he was sentenced to an aggregate sentence of 19 to 55 years imprisonment on February 7, 1992. He was a witness for the Commonwealth in its case against Sattazahn.

who had a .22 caliber semi-automatic pistol, and Hammer, who had a .41 caliber revolver, told Boyer to drop the bag and put his hands up. Boyer put up his hands but threw the bag toward the restaurant. After being forced to retrieve it by Sattazahn, Boyer again threw it toward the restaurant's roof and tried to run away. Hammer heard Sattazahn fire once and then himself fired a single warning shot into the air. Sattazahn fired two or three more times and Boyer fell to the ground. Sattazahn and Hammer grabbed the bank deposit bag and fled. Record, N.T., 5/6/91, 494-96, 504-11.

The autopsy on the victim showed that Boyer had been shot five times: twice in the lower back; once in the left shoulder; once in the lower face; and once in the back of the head. All of the wounds were consistent with being inflicted by a .22 caliber bullet. Two slugs recovered from Boyer's body and five discharged cartridge cases found at the scene were identified as having been fired from the .22 caliber weapon Sattazahn was shown to own. Record, N.T. 5/3/91, 233-52. The jury found Sattazahn guilty of first, second and third degree murder, robbery and other related offenses. Record, N.T., 5/9/91, 893-94.

In the penalty phase which followed, the jury did not reach a decision as to Sattazahn's sentence, nor did it make any findings with respect to aggravating or mitigating circumstances.[2] J.A., 25-29. The trial court had determined, after three and one-half hours of deliberation, that the jury was hopelessly deadlocked and, at the request of the defense, dismissed the jury as hung. J.A., 22-24.

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[2]In the penalty phase, the Commonwealth had sought to prove one aggravating circumstance: that the defendant committed the killing while in the perpetration of a felony, 42 Pa.C.S. § 9711(d)(6). The defense sought to prove two mitigating circumstances: the defendant's lack of a significant history of prior criminal convictions and his age at the time of the crime.

On February 14, 1992, in accordance with the provisions of Pennsylvania law, *see* 42 Pa.C.S. § 9711(c)(1)(v), Sattazahn was sentenced to a term of life imprisonment on the first degree murder conviction, and to consecutive terms of incarceration for other crimes of which he had been found guilty in the same trial.[3] J.A. 45-46. In addition, between September 19, 1991, and April 1, 1992, Sattazahn entered guilty pleas to and was sentenced on five burglaries and one robbery in Berks County, third degree murder committed on December 26, 1987, in Schuylkill County, and burglary charges in Lebanon County, J.A., 79.

Sattazahn then appealed his convictions for first degree murder and other crimes related to Richard Boyer's death to the Pennsylvania Superior Court. In its decision issued at *Commonwealth v. Sattazahn*, 428 Pa.Super. 413, 631 A.2d 597 (1993), that court ruled that the evidence adduced at trial was insufficient to support convictions on certain of the related crimes and dismissed those charges. With respect to the remaining convictions, including the first degree murder conviction, the Superior Court ruled that the trial judge had erred in instructing the jury, reversed the convictions and remanded for a new trial on those charges. The Superior Court denied a request for reargument by the Commonwealth and the Pennsylvania Supreme Court declined to review the case.[4]

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[3]Under Pennsylvania law, Sattazahn's convictions for second and third degree murder merged, for sentencing purposes, with his first degree murder conviction. *Commonwealth v. Williams*, 521 Pa. 556, 559 A.2d 25 (1989). For the remaining crimes of which he had been found guilty, he received a consecutive aggregate sentence of 12 to 24 years imprisonment.

[4]Review by the Pennsylvania Supreme Court is discretionary.

(continued...)

With respect to the impending new trial, the Commonwealth again served notice that it would seek the death penalty. That notice identified the specific aggravating circumstances the Commonwealth would seek to prove in the event a penalty phase were to be conducted. The Commonwealth's notice listed the same aggravating circumstance it had sought to prove at Sattazahn's first trial, *see* n.2, supra, and one not previously sought in those proceedings.[5] J.A., 47-50.

The defense filed a motion in the trial court to prevent the Commonwealth from seeking the death penalty and to prevent it from seeking to prove the added aggravating circumstance. That motion was denied. J.A., 54-67. The trial court's ruling was affirmed by the Superior Court which reviewed it in an interlocutory appeal. *Commonwealth v. Sattazahn*, No. 02274 PHILA 1995, *rearg. denied*, June 21, 1996. The Pennsylvania Supreme Court declined to grant review of the Superior Court's ruling. *Commonwealth v. Sattazahn*, 547 Pa. 742, 690 A.2d 1162 (1997).

At the re-trial which ensued, the jury convicted Sattazahn of the first degree murder of Richard Boyer and of

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[4](...continued)
Pa.R.A.P. 1112, 42 Pa.C.S. The Commonwealth filed a petition for allowance of appeal in that court and Sattazahn cross-petitioned. Initially, the court granted the Commonwealth's petition and denied Sattazahn's cross-petition. *Commonwealth v. Sattazahn*, 537 Pa. 639, 644 A.2d 162 (1994). After briefs were filed and argument held, the court dismissed the Commonwealth's appeal as improvidently granted. *Commonwealth v. Sattazahn*, 539 Pa. 270, 652 A.2d 293 (1994).

[5]The Commonwealth's notice added the aggravating circumstance found at 42 Pa.C.S. § 9711(d)(9), "that the defendant had a significant history of felony convictions involving the use or threat of violence to the person."

other related charges. In the penalty phase of the trial, the jury sentenced Sattazahn to death, unanimously concluding that the two aggravating circumstances which it had determined to exist outweighed the three mitigating circumstances it had found.[6] J.A., 85-88.

Sattazahn appealed to the Pennsylvania Supreme Court which affirmed the judgment of sentence in a decision dated November 27, 2000.[7] *Commonwealth v. Sattazahn*, 563 Pa. 533, 763 A.2d 359 (2000); J.A., 91-109. In that appeal, he maintained, *inter alia*, that the federal Due Process Clause and Double Jeopardy Clause prohibited the Commonwealth from seeking the death penalty in his retrial. The Pennsylvania Supreme Court, relying on *Bullington v. Missouri*, 451 U.S. 430 (1981), *Arizona v. Rumsey*, 467 U.S. 203 (1984), and *Poland v. Arizona*, 476 U.S. 147 (1986), held that, since the jury, as decisionmaker in the first trial, made no findings regarding the aggravating and mitigating circumstances and failed to reach a verdict, there was no acquittal on the merits of the death penalty and, therefore, no double jeopardy bar to seeking the death penalty at the second trial. *Commonwealth v. Sattazahn*, 563 Pa. 533, 548-49, 763 A.2d 359, 367-68. The Court also found that due process did not prevent the Commonwealth from seeking the death penalty on retrial since the United States Supreme Court had rejected the claim that a harsher sentence on retrial had a

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[6]The jury found the following aggravating circumstances: that the defendant committed the murder while in the perpetration of a felony, 42 Pa.C.S. § 9711(d)(6), and that the defendant had a significant history of felony convictions involving the use or threat of violence to the person, 42 Pa.C.S. § 9711(d)(9). It also found these mitigating circumstances: the testimony of Sattazahn's mother and employer and his plea of guilty to third degree murder. J.A., 87-88.

[7]In Pennsylvania, capital cases are appealed directly to the Pennsylvania Supreme Court. 42 Pa.C.S. § 9711(h)(1).

chilling effect on the defendant's right to appeal. *Sattazahn*, 563 Pa. at 551, 763 A.2d at 368-69.

SUMMARY OF ARGUMENT

I. In *Poland v. Arizona*, 476 U.S. 147, this Court stated that the only exception to the "clean slate" rule on re-sentencing found in *North Carolina v. Pearce*, 395 U.S. 711 (1969), arises when the decisionmaker at the first trial or the reviewing court finds that the prosecution failed to prove its case. The determination that the prosecution has failed to prove its case with regard to whether death is the appropriate remedy requires a verdict of acquittal. When a jury reaches no verdict in the penalty phase of a capital case, it does not decide that the prosecution has not proved its case with regard to death - it simply makes no decision. With no finding that the prosecution has not proved its case, there has been no acquittal of death and the "clean slate" rule must apply when the defendant receives a new trial on appeal.

Although Pennsylvania's capital sentencing procedure resembles a trial and thus triggers the need to determine if double jeopardy protections are available to a defendant, the availability of such protections does not necessarily mean that the protections apply to bar a retrial on death. In the situation where the jury reaches no verdict and the judge, without reviewing the evidence or making any independent findings, thereafter imposes the required life sentence under the statute, there has never been an acquittal or any findings by the decisionmaker that the Commonwealth has failed to prove its case. This situation comports with the jurisprudence on hung juries, not acquittals. The situation where a jury has deadlocked because it is unable to decide a matter has never been equated with an acquittal. *Richardson v. United States*, 468 U.S. 317, 324-35 (1984).

The imposition of a life sentence by the judge, after the jury deadlocked at the penalty phase of Sattazahn's first trial, also fails to meet the definition of an acquittal. The jury made

no findings at all in failing to reach a verdict. The section of the statute under which the judge imposed the life sentence allows for no review of the evidence prior to imposition of sentence and requires no findings by the judge as to whether the prosecution proved its case. The record shows that this judge made no review of the evidence and no findings of any kind. Therefore, the life sentence imposed by the judge resolved no factual matters in the case and cannot be equated with an acquittal.

Since there has never been a decision by either jury or judge at the first trial that the prosecution failed to prove its case that death was the appropriate punishment for the murder committed by Sattazahn, then double jeopardy did not bar society from seeking the appropriate punishment for Sattazahn when new jeopardy attached as a result of his receiving a new trial on appeal. The government, in a situation where the defendant has never been acquitted on the merits of the death penalty, is permitted to pursue society's interest in punishing the defendant when his guilt is made clear after obtaining a "clean slate."

II. The Pennsylvania death penalty statute did not give Sattazahn a life and liberty interest in the default life sentence imposed by the judge after the jury deadlocked in the penalty phase of the trial because the imposition of the sentence was merely a ministerial act by the judge. Assuming *arguendo* that such an interest was created by the statute, the interest did not survive the vacation of the original default sentence. At most, Sattazahn had a life and liberty interest in the imposition of a life sentence if the jury deadlocked in the penalty phase of his trial. He received that life sentence. After he received a new trial on appeal, he lost any interest he had in the default sentence imposed at the first trial.

Nothing in due process jurisprudence suggests that a life and liberty interest can never be disturbed. The only legal theory that could support Sattazahn's suggestion that his life and liberty interest in the default life sentence is immutable is found in double jeopardy analysis. Due process simply requires that Sattazahn receive the proper process due before depriving him of a life and liberty interest.

The Supreme Court of Pennsylvania, which is the highest court in the Commonwealth, has interpreted the state's death penalty statute as clearly differentiating between a verdict by a jury and the life sentence imposed by the judge in the event of a deadlocked jury. In addition, the Court has found that the legislative decision to provide for a default life sentence does not in any way show an intent to preclude the death penalty upon reconviction. As the final arbiter of Pennsylvania law, the Supreme Court of Pennsylvania's interpretation of Pennsylvania law is binding on Sattazahn.

Once Sattazahn received a new trial after his first jury deadlocked on the death penalty, the prosecution could again seek the death penalty under the statute. He received the full panoply of pretrial, trial and appellate rights before that sentence was imposed, thereby protecting him from any arbitrary imposition of the death penalty. The Commonwealth provided notice and he had the opportunity to be heard at all stages of the second trial. Therefore, he received every protection to which he was entitled under the Due Process Clause. Neither the Due Process Clause nor the Pennsylvania statute created an entitlement in Sattazahn to the default life sentence beyond the first trial.

ARGUMENT

I. The Double Jeopardy Clause did not prohibit the capital retrial of David Sattazahn after he had obtained a new trial on appeal when the first jury had not acquitted him of the death penalty.

In *Poland v. Arizona*, 476 U.S. 147, this Court told states like Pennsylvania, whose laws provide for a sentencing procedure in capital cases which is similar to a trial, that the Fifth Amendment's Double Jeopardy Clause does not prevent the prosecution from seeking the death penalty in the retrial of a case if, in the previous trial, neither the sentencing jury nor an appellate court had rendered a decision determining that the prosecution had not proved its case. *Poland* did not alter, but rather clarified, the principle announced in *Bullington v. Missouri*, 451 U.S. 430, later reiterated in *Arizona v. Rumsey*, 467 U.S. 203, that constitutional protections against double jeopardy prevent the prosecution from seeking a death penalty upon retrial of a case where the jury in the prior trial agreed, or an appellate court had decided, that the evidence presented by the prosecution was insufficient to support the death penalty.

For purposes of double jeopardy jurisprudence, as the Court in *Poland* pointed out, a decision by a jury, or by an appellate court, that the prosecution had failed to prove its case represents the singular exception to the "clean slate" rule, which typically allows the prosecution to seek the same, or an even greater, punishment in the retrial of a case. *Poland*, 476 U.S. at 152 (citing *Bullington*, 451 U.S. at 443, and *North Carolina v. Pearce*, 395 U.S. 711, 721 (1969)). Because a trial-like sentencing proceeding in a capital case had "the hallmarks of [a] trial on guilt or innocence," *see id.* at 439, the Court said that "the protection afforded by the Double Jeopardy Clause to one acquitted by a jury was also available to [a defendant in a capital case], with respect to the death penalty, at his retrial."

Id. at 446. Accordingly, at the conclusion of that type of proceeding, if the sentencing decisionmaker has returned a verdict which rejects the prosecution's case, there has been an "acquittal" as to the death penalty for that particular defendant and double jeopardy bars his exposure to that penalty upon retrial.

Poland, however, made it clear that it is an "acquittal" by the sentencing jury or by an appellate court on the question of what penalty the defendant should receive–and only an "acquittal"–which triggers the protections of double jeopardy. *Poland*, 476 U.S. at 153. Referring to what it had said earlier in *Bullington*, and in *Rumsey*, the Court stressed that constitutional protections against double jeopardy serve to enforce the "absolute finality" that our system of justice has chosen to accord to a verdict of acquittal, even an incorrect verdict. *Id.* at 153 and n. 2.

> '[T]he law attaches particular significance to an acquittal. To permit a second trial after an acquittal, however mistaken the acquittal may have been, would present an unacceptably high risk that the Government, with its vastly superior resources, might wear down the defendant so that "even though innocent he may be found guilty."' *United States v. Scott*, 437 U.S. 82, 91 (1978)(quoting *Green v. United States*, 355 U.S. 184, 188 (1957)).

Id. at 156 (citation in original). For purposes of a sentencing verdict, in keeping with the analogy *Bullington* used in discussing trial-like penalty proceedings in capital cases, an acquittal means the prosecution "received 'one fair opportunity to offer whatever proof it could assemble,'" but that the decisionmaker, by returning a verdict of "acquittal" had affirmatively determined that its evidence was insufficient to

justify imposition of the death penalty. *Bullington*, 451 U.S. at 446 (quoting *Burks v. United States*, 437 U.S. 1, 16 (1978)).

Rejecting the petitioners' argument in *Poland* that, on retrial, the prosecution was barred from asking the judge to find particular aggravating circumstances which the judge had previously declined to find, consistent with its explanation of the particular significance of an acquittal, the Court said that it is not the determination of individual factors which might figure in the decisionmaker's conclusion about the suitability of the death penalty, but the ultimate decision itself, which has significance for double jeopardy purposes. "Under *Bullington* and *Rumsey*, . . . the relevant inquiry . . . is whether the sentencing [decisionmaker] or the reviewing court has 'decid[ed] that the prosecution has not proved its case' for the death penalty and hence has 'acquitted' the [defendant]." *Poland*, 476 U.S. at 154 (quoting *Bullington*, 451 U.S. at 433). Because there had been no finding in *Poland* that "the evidence [was] legally insufficient to justify imposition of the death penalty, there was no death penalty "acquittal" . . . ." *Id.* at 157.

Here, too, there was no "acquittal," and therefore no double jeopardy bar to the Commonwealth's seeking the death penalty when it retried Sattazahn. The sentencing jury in his first trial did not find that the prosecution's evidence was legally insufficient to support a death penalty. The only thing it decided was that it couldn't decide. The Pennsylvania Supreme Court, guided by the Court's decisions in *Bullington*, *Rumsey* and *Poland*, correctly appreciated this distinction and gave it proper effect. The first jury's action was a non-decision which had no consequence for purposes of double jeopardy under the teachings of those cases. There is no support in either federal law or the law of Pennsylvania, for the notion that the inability on the part of a jury to decide a matter equates with a judgment as to the merits of the prosecution's case. *(See, e.g., Richardson v. United States*, 468 U.S. 317; *Commonwealth v. James*,

506 Pa. 526, 486 A.2d 376 (1985); *Commonwealth v. Marconi*, 340 Pa.Super. 463, 490 A.2d 871 (1985)).

Indeed, as *Richardson* reflects, this Court's double jeopardy jurisprudence has never seen a jury's failure to reach a verdict as an event which triggers the protections of double jeopardy. In order to decide that double jeopardy barred the Commonwealth from seeking the death penalty in Sattazahn's retrial, this Court must first find that the life sentence imposed upon Sattazahn at his first trial as a result of the jury's failure to reach a verdict triggered such protections. Such a holding is totally inconsistent with this Court's holdings in *Poland*, *Rumsey* and *Bullington*.

In *Poland v. Arizona*, 476 U.S. 147, this Court stated that "the relevant inquiry in [*Bullington* and *Rumsey*] is whether the sentencing judge or reviewing court has 'decid[ed] that the prosecution has not proved its case' for the death penalty and hence has 'acquitted' petitioners. *Bullington*, 451 U.S. at 443." *Poland*, 451 U.S. at 154. If that, in fact, is the relevant inquiry in determining whether the Double Jeopardy Clause bars reseeking the death penalty, then Sattazahn's argument must fail since neither the jury, the judge nor any reviewing court ever decided that the prosecution did not prove its case for the death penalty in his first trial. The defendant was never "acquitted" of the death penalty.

The Commonwealth agrees that the capital sentencing procedure in Pennsylvania resembles a trial for double jeopardy purposes, just as the Missouri and Arizona sentencing proceedings in *Bullington* and *Rumsey*, and that the procedure, therefore, triggers the need to determine if protection is available under the Double Jeopardy Clause. The fact that double jeopardy protection may be available does not mean that it necessarily bars a retrial on death. Unlike the juries in *Bullington* and *Rumsey*, the instant defendant's first jury failed

to reach a verdict after approximately three and one-half hours of deliberation and the defendant's attorney immediately asked that the jury be discharged. J.A., 22. Thereafter, the judge, without making any findings or even considering the evidence presented at the sentencing hearing, imposed a life sentence as required by Pennsylvania's capital sentencing statute. 42 Pa.C.S. § 9711(c)(1)(v).

Significant for purposes of double jeopardy analysis is the failure of the jury in Sattazahn's first trial to reach a verdict or make any findings. Their inaction resulted in the absence of a finding or decision about the sufficiency of the Commonwealth's proof. The fact that the judge was then required to impose a life sentence did not transform the lack of findings as to the sufficiency of the evidence into an acquittal.

In *Rumsey*, this court held that the double jeopardy principle in both *Bullington* and *Rumsey* was that " . . . an acquittal on the merits by the sole decisionmaker in the proceeding is final and bars retrial on the same charge." *Rumsey*, 476 U.S. at 211. However, the reason a jury is hung is precisely because there is not a decision on the merits. The fact that the statute requires the presiding judge to impose a life sentence in the event of a deadlocked jury does not transform the lack of a verdict into a decision on the merits. If there is no decision on the merits, there is no acquittal and, therefore, no bar to retrial on the same charge under the Double Jeopardy Clause.

In *Bullington*, this Court first applied the protections of double jeopardy to a sentencing proceeding. *Bullington v. Missouri*, 451 U.S. 430. It was the first case in which this Court reviewed a capital sentence proceeding which resembled a trial on the question of guilt or innocence. In *Bullington*, the defendant was convicted of capital murder by a jury and, after a separate capital sentencing proceeding, the same jury

returned a verdict of life imprisonment. The trial court subsequently granted Bullington's motion for a new trial. The prosecution again sought the death penalty at the retrial. *Bullington*, 451 U.S. at 435-36. After granting *certiorari*, this Court held that the prosecution was barred from reseeking the death penalty.

In reaching this decision, this Court discussed its resistance to extending double jeopardy principles to sentencing because "[t]he imposition of a particular sentence usually is not regarded as an 'acquittal' of any more serious sentence that could have been imposed." *Bullington*, 451 U.S. at 438. However, this Court recognized that the capital sentencing proceeding before it in *Bullington* differed from the sentencing proceedings it had considered in previous cases where it had rejected the applicability of double jeopardy protections to sentencing. *Bullington*, 451 U.S. at 438.

In the sentencing proceeding in *Bullington*, the prosecution had the burden to prove certain facts beyond a reasonable doubt in order to obtain the harsher of the only two sentencing alternatives, life imprisonment and death. The hearing at which the prosecution sought to prove these facts was in all relevant respects like the trial on the question of guilt or innocence. The jury was provided with standards to guide it in making the choice between the two alternatives and had to make specific findings regarding the aggravating and mitigating circumstances to render a verdict imposing the death penalty. *Bullington*, 451 U.S. at 438.

This Court recognized that one of the results of these differences in sentencing proceedings was that, in the usual sentencing proceeding, it was impossible to conclude that the reason for imposing less than the statutory maximum sentence was the sentencer's decision that the government had failed to prove its case. *Bullington*, 451 U.S. at 443. "By enacting a

capital sentencing procedure that resembles a trial on the issue of guilt or innocence, however, Missouri explicitly requires the jury to determine whether the prosecution has 'proved its case.'" *Bullington*, 451 U.S. at 444. What *Bullington* does not address is what happens when the jury fails to make this determination.

Because of the clear verdict by the sentencer in *Bullington*, which sentenced the defendant to life imprisonment after a sentencing proceeding which was like the trial on his guilt or innocence, the Double Jeopardy Clause precluded the government from again seeking the death penalty on retrial. *Bullington*, 451 U.S. at 446. What *Bullington* does not hold is that the mere imposition of a life sentence by operation of statute where no verdict is rendered, in a capital sentencing proceeding which resembles a trial on guilt or innocence, is sufficient to invoke the Double Jeopardy Clause to bar the death sentence upon retrial.

In *Arizona v. Rumsey*, 467 U.S. 203, this Court again reviewed a capital sentence proceeding which resembled a trial on the question of guilt or innocence. The facts in *Rumsey* were that Rumsey had been convicted by a jury of robbery and first degree murder. The trial judge then conducted a separate sentencing hearing to determine whether death was the appropriate sentence. The trial judge subsequently returned a "special verdict" setting forth his findings on the aggravating and mitigating circumstances. Finding no aggravating or mitigating circumstances, the trial court imposed a life sentence. *Rumsey*, 467 U.S. at 205-206. This Court stated that the relevant double jeopardy principle in both *Bullington* and *Rumsey* was that "**an acquittal on the merits by the sole decisionmaker** in the proceeding is final and bars retrial on the same charge." *Rumsey*, 467 U.S. at 211 (**emphasis added**). This Court went on to recognize that the initial sentence imposed by the sentencer was an acquittal on the merits of whether death

was an appropriate punishment for the offense. *Rumsey*, 467 U.S. at 211. Specifically, this Court said: "That judgment, **based on findings sufficient to establish legal entitlement to the life sentence**, amounts to an acquittal on the merits. . ." *Rumsey*, 467 U.S. at 211 (**emphasis added**). Therefore, the factors considered by this Court in *Rumsey* with regard to the double jeopardy bar on seeking death at the second trial went beyond the mere imposition of a life sentence at the first trial. They included an acquittal on the merits by the sole decisionmaker and findings made by the decisionmaker which were sufficient to establish legal entitlement to the life sentence.

In *Poland*, this Court revisited *Rumsey* and *Bullington* and clearly limited its holding in *Bullington*. The defendants in *Poland* were convicted by a jury of first degree murder. The trial judge then sat as decisionmaker at a separate sentencing hearing where he would determine what aggravating and mitigating circumstances were proven and then weigh these circumstances to determine a sentence of life imprisonment or death. The State presented evidence of two aggravating circumstances: that the crime was committed "in expectation of the receipt of something of pecuniary value" and that the crime had been committed in an "especially heinous, cruel or depraved manner." The judge found only the "especially heinous" circumstance and sentenced the defendants to death. On appeal, the Arizona Supreme Court held that there was insufficient evidence to support the judge's finding of the "especially heinous" circumstance and that the trial court misinterpreted the law in rejecting the application of the "pecuniary value" circumstance. On remand, the defendants were again tried and convicted of first degree murder. The State again sought death and argued the same two aggravating circumstances, presenting additional evidence. The judge found both circumstances and sentenced the defendants to death. After granting *certiorari*, this Court considered whether

the Double Jeopardy Clause barred the reimposition of the death penalty.

The defendants argued that they had been acquitted of both aggravating circumstances, claiming that the trial court acquitted them of the "pecuniary gain" circumstance when it did not find that circumstance at the first sentencing and the appellate court acquitted them of the "especially heinous" circumstance when it found insufficient evidence to support it on appeal. After reviewing the record and finding that at no point in the first capital sentencing hearing and appeal did either the sentencer or the reviewing court hold that the prosecution failed to prove its case that death was the appropriate punishment, this Court stated:

> We reject the fundamental premise of petitioners' argument, namely, that a capital sentencer's failure to find a particular aggravating circumstance alleged by the prosecution always constitutes an "acquittal" of that circumstance for double jeopardy purposes. Bullington indicates that **the proper inquiry is whether the sentencer or the reviewing court has "decided that the prosecution has not proved its case" that the death penalty is appropriate**. We are not prepared to extend Bullington further and view the capital sentencing hearing as a set of minitrials on the existence of each aggravating circumstance. Such an approach would push the analogy on which Bullington is based past the breaking point.
>
> Aggravating circumstances are not separate penalties or offenses, but are "standards to guide the making of [the] choice"

> between the alternative verdicts of death and life imprisonment. 451 U.S. at 438. Thus, under Arizona's capital sentencing scheme, **the judge's finding of any particular aggravating circumstance does not of itself "convict" a defendant** (i.e., require a death penalty), **and the failure to find any particular aggravating circumstance does not "acquit" a defendant** (i.e., preclude the death penalty).

Poland, 476 U.S. at 155 (**emphasis added**).

If a finding of particular aggravating circumstance does not by itself convict and the failure to find a particular circumstance does not acquit a defendant of the death penalty under *Poland*, then how does the failure to reach a verdict at all become an acquittal? In fact, Sattazahn had been convicted of first degree murder and robbery at the guilt phase of the trial. Therefore, the jury necessarily had already found that the government had proved its aggravating circumstance - that the defendant had committed the killing while in the perpetration of a felony[8] - beyond a reasonable doubt. Therefore, there can be no question in this case, despite the deadlocked jury, that the government had produced sufficient evidence to prove its case for death.

The deciding factor for this Court in applying double jeopardy protections to particular sentencing proceedings has been that the capital sentencing proceedings under review were like a trial on guilt or innocence. If the capital sentencing proceeding is like a trial to warrant double jeopardy protections, than it must be like a trial with regard to the definition of acquittals.

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[8] 42 Pa.C.S. § 9711(d)(6)

At his first trial in 1991, the jury convicted David Sattazahn of first degree murder. At the sentencing proceeding following the guilt phase of the trial, the jury deadlocked on the issue of death. Sattazahn's counsel immediately requested that the jury be discharged and a life sentence be imposed. After speaking briefly with the jury, the trial court did in fact discharge the jury and imposed a sentence of life imprisonment as mandated by 42 Pa.C.S. § 9711(c)(1)(v). Neither the jury nor the judge made any findings with regard to the evidence presented by the government.

In the months following the first degree murder conviction, the defendant entered guilty pleas to a 1987 murder in Schuylkill County, five 1989 burglaries and one 1989 robbery in Berks County, and other burglary charges in Lebanon County. These cases had been charged but deferred until his trial was completed, which had allowed him to offer as a mitigating circumstance his lack of a significant history of prior criminal convictions. He also chose to file an appeal from his conviction for first degree murder and the life sentence imposed by the trial court. He sought and obtained a new trial based on a jury instruction.

After the defendant filed his appeal, the Supreme Court of Pennsylvania decided *Commonwealth v. Martorano*, 535 Pa. 178, 634 A.2d 1063 (1993), a case which addressed the Commonwealth's ability to seek death on a capital retrial where the jury had deadlocked in the first trial on the issue of death. The state court examined federal precedent and concluded that, in *Poland v. Arizona*, 476 U.S. 147, this Court had reaffirmed the application of the 'clean slate' rule of *North Carolina v. Pearce*, 395 U.S. 711, unless the sentencing judge or reviewing court has decided that the prosecution has not proved its case for the death penalty. *Martorano*, 535 Pa. at 193, 634 A.2d at 1070.

Sattazahn's first jury made no findings and reached no verdict. The trial court was not a decisionmaker at all, but rather an administrator of a statutorily compelled life sentence. No findings of any kind were made, let alone findings sufficient to establish any legal entitlement to a life sentence. Since there had been no decision by the jury, the sentencing judge or the reviewing court that the prosecution had not proved its case for death at Sattazahn's first sentencing proceeding, the Commonwealth again sought the death penalty at the second trial pursuant to this Court's 1986 decision in *Poland*. The second jury convicted Sattazahn of first degree murder and sentenced him to death.

The defendant argues that, in the first trial, the prosecution failed to meet its burden of proving the aggravating circumstances beyond a reasonable doubt because it failed to persuade all twelve capital jurors that death was the appropriate punishment. Petitioner's Brief, at 16-17. However, the failure to persuade has traditionally resulted in a hung jury at a trial. In fact, this Court has recognized that "[t]he argument that a jury's inability to agree establishes reasonable doubt as to the defendant's guilt, and therefore requires acquittal, has been uniformly rejected in this country." *Arizona v. Washington*, 434 U.S. 497, 509 (1978). It is only the failure to produce sufficient evidence that has caused double jeopardy violations.

The Commonwealth's burden of proof consists of the burden of production and the burden of persuasion. *Mullaney v. Wilbur*, 421 U.S. 684, 702 n. 31 (1975). As this Court has stated:

> . . . Where one party has at stake an interest of transcending value – as a criminal defendant his liberty – this margin of error is reduced as to him by the process of placing on the other party the burden of producing a sufficiency of

> proof in the first instance, and of persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt.

Speiser v. Randall, 357 U.S. 513, 525 (1958).

The defendant cites to *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977), for the proposition that, when a trial court enters a directed verdict after discharging a deadlocked jury, that directed verdict constitutes a judgment of acquittal. Petitioner's Brief, at 25. However, in *Martin Linen*, the directed verdict was entered after the District Court evaluated the evidence and determined that it was legally insufficient to sustain a conviction. *Martin Linen*, 430 U.S. at 572. At Sattazahn's first trial, the judge who imposed the life sentence conducted no evaluation of the evidence and neither the jury nor the judge made a finding that the evidence was insufficient to impose death.

In the same manner, the defendant cites to *Smalis v. Pennsylvania*, 476 U.S. 140 (1986), as holding that, once a defendant is acquitted, whether by the jury or the court, the defendant cannot be subjected to post-acquittal, fact finding proceedings going to guilt or innocence without violating the Double Jeopardy Clause. Petitioner's Brief, at 25. While that, in fact, is the holding of *Smalis*, this Court reached that holding by reasoning that the grant of a demurrer by the trial court is an acquittal because it is a ruling by the trial court that the government's evidence is insufficient to establish his factual guilt. *Smalis*, 476 U.S. at 144. Once again, neither the jury nor the judge at Sattazahn's first trial ever determined that the evidence was insufficient to impose death.

Neither *Martin Linen* nor *Smalis* stand for the proposition that when the government fails to meet its burden of persuasion it is barred from retrial by the Double Jeopardy

Clause. Rather, they stand for the proposition that, when the government fails to meet its burden of production, the Double Jeopardy Clause bars retrial.

In *United States v. Perez*, 22 U.S. 579 (1924), the government failed to meet its burden of persuasion and the jury hung on the defendant's guilt in a capital case. This Court held that "...the facts constitute no legal bar to a future trial. The prisoner has not been convicted or acquitted, and may again be put upon his defence." *Perez*, 22 U.S. at 580. In Sattazahn's first trial, the Commonwealth failed to meet its burden of persuasion in the sentencing proceeding and the jury did not return a verdict. Just as in *Perez*, the defendant was not convicted or acquitted and there should be no bar to a future trial.

In *Richardson v. United States*, 468 U.S. 317, this Court reiterated that "we have constantly adhered to the rule that a retrial following a 'hung jury' does not violate the Double Jeopardy Clause." *Richardson*, 468 U.S. at 324. This Court held that double jeopardy protection only applies "if there has been some event, such as an acquittal, which terminates the original jeopardy" and that a hung jury is not the equivalent of an acquittal. *Richardson*, 468 U.S. at 325. "[T]he failure of a jury to reach a verdict is not an event which terminates jeopardy." *Richardson*, 468 U.S. at 325.

The determination that jeopardy has attached begins but does not end the inquiry into whether retrial is barred by the Double Jeopardy Clause. *Serfass v. United States*, 420 U.S. 377, 389 (1975). The Commonwealth agrees with the defendant that jeopardy attaches to the Pennsylvania capital sentencing proceeding, as determined by this Court in *Bullington* and *Rumsey*. The Commonwealth does not agree with the defendant's conclusion that this Court has held that the nature

of the proceeding necessarily requires a double jeopardy bar to seeking the death penalty on retrial.

In interpreting the Double Jeopardy Clause, this Court has disparaged the use of rigid mechanical rules. *Serfass*, 420 U.S. at 389. While the prohibition against multiple trials is the constitutional principle in double jeopardy analysis, the bar to retrial is not absolute. *United States v. DiFrancesco*, 449 U.S. 117, 132 (1980). It is an acquittal which bars retrial, even if the acquittal is an error. *DiFrancesco*, 449 U.S. at 132; *United States v. Scott*, 437 U.S. 83, 91; *Bullington*, 451 U.S. at 445; *Rumsey*, 467 U.S. at 211; *Poland*, 476 U.S. at 156-57.

This Court has repeatedly recognized that "what constitutes an 'acquittal' is not to be controlled by the form of the judge's action." *Martin Linen*, 430 U.S. at 571; *Serfass*, 420 U.S. at 392; *Scott*, 427 U.S. at 96-97. "[A]n appeal is not barred [on double jeopardy grounds] simply because a ruling in favor of a defendant 'is based upon facts outside the face of the indictment...'" *Scott*, 437 U.S. at 96. An acquittal for purposes of double jeopardy occurs "only when 'the ruling of the judge, whatever its label, actually represents a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charges.'" *Scott*, 437 U.S. at 97, (quoting *Martin Linen*, 430 U.S. at 571).

This Court has recognized that:

> ...a defendant who has been released by a court for reasons required by the Constitution or laws, but which are unrelated to factual guilt or innocence, has not been determined to be innocent in any sense of that word, absolute or otherwise. In other circumstances, this Court has had no difficulty in distinguishing between those rulings which relate to the 'ultimate question of guilt or innocence' and those which serve other purposes.

Scott, 437 U.S. at 98, n.11 (citation omitted). The mandatory ruling in Sattazahn's first trial that resulted in the imposition of a life sentence did not relate in any way to the ultimate question of whether death was the appropriate sentence for Sattazahn.

Although Sattazahn repeatedly refers to the life sentence imposed by the trial court at his first trial as an "acquittal of death" or a "directed life verdict," the life sentence imposed simply fails to meet the accepted definition of acquittal. The imposition of the life sentence in this case made no resolution of any of the factual elements involved in the capital sentencing proceeding. First of all, the jury made no findings at all in failing to reach a verdict. Then the judge simply followed the statute and, without considering the evidence presented, imposed a sentence of life, again with no findings of any factual elements.

Sattazahn states that "[t]his Court's conception of an "acquittal" of death is the imposition of a life sentence after a trial-like proceeding tried to completion" and cites to *Schiro v. Farley*, 510 U.S. 222, 232 (1994); *Poland v. Arizona*, 476 U.S. at 152; *Smalis v. Pennsylvania*, 476 U.S. at 145 n.8; *Arizona v. Rumsey*, 467 U.S. at 211; and *Bullington v. Missouri*, 451 U.S. at 445-46. Petitioner's Brief, at 29. The Commonwealth contends that Sattazahn overstates each of the cited cases.

As previously set forth, *Bullington* and *Rumsey* resulted from definitive life sentences imposed by the decision makers, thus logically resulting in acquittals of death. *Poland* specifically states that the relevant inquiry arising from *Bullington* and *Rumsey* was whether the sentencer or the reviewing court has determined that the prosecution has not proved its case for the death penalty - not merely whether a life

sentence was imposed at the conclusion of a trial-like proceeding. *Poland*, 476 U.S. at 154. *Poland* stated that *Bullington* and *Rumsey* require "an acquittal on the merits by the sole decision maker" for the decision to be final, barring retrial on the same issue, and refused to extend *Bullingon* further. *Poland*, 476 U.S. at 154, 156-67.

Sattazahn argues that the *Smalis* trial court's grant of a demurrer is the same as the life sentence imposed in the instant case. This argument ignores the fact that the ruling in *Smalis* resulted from the trial court's decision that the evidence presented was insufficient to go to the jury. This decision by the judge in *Smalis* could only have been reached after he reviewed the evidence and determined that the government failed to meet its burden of production, following established precedent with regard to acquittals, which would bar retrial. In the instant case, the judge reviewed no evidence and made no determination regarding the government's evidence, thereby corresponding to established precedent with regard to hung juries, which allows retrials.

The argument raised in *Schiro* was that the government was precluded by the Double Jeopardy Clause and the doctrine of collateral estoppel from seeking the death penalty after the guilt phase jury found him guilty of the count which charged that he killed his victim while committing the crime of rape, and left the verdict slip blank as to the count which charged that he knowingly killed her. Schiro argued that the jury had acquitted him of an intentional killing and that, therefore, since the aggravating factor which allowed the government to seek death was that the defendant committed the murder while intentionally killing the victim while committing or attempting to commit rape, the government was barred from relitigating the issue of the intentional murder. *Schiro*, 510 U.S. at 226-27. This Court ruled against Schiro on both claims, finding that the government simply conducted a single sentencing hearing in

the course of a single prosecution and that Schiro did not meet his burden of establishing the factual predicate for the application of the collateral estoppel doctrine, since he failed to show that an issue of ultimate fact had been determined in his favor. *Schiro*, 510 U.S. at 231-32.

The citation to *Schiro* provided by Sattazahn actually deals with a portion of the court's discussion regarding collateral estoppel. The Double Jeopardy Clause incorporates the doctrine of collateral estoppel or issue preclusion in criminal proceedings. *Schiro*, 510 U.S. at 232. Collateral estoppel holds that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Schiro*, 510 U.S. at 232 (quoting *Ashe v. Swenson*, 397 U.S. 436, 443 (1970)). The first inquiry in collateral estoppel analysis is whether a rational jury could have grounded its verdict upon an issue other than the issue in question. *Schiro*, 510 U.S. at 233.

The *Schiro* Court found that the jury could have grounded its verdict on an issue other than intent to kill. *Schiro*, 510 U.S. at 233. In conclusion, this Court stated:

> The failure to return a verdict does not have collateral estoppel effect, however, unless the record establishes that the issue was actually and necessarily decided in the defendant's favor. As explained above, our cases require an examination of the entire record to determine whether the jury could have "grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration."

Schiro, 510 U.S. at 236 (citing *Ashe v. Swenson*, 397 U.S. 436, 444 (1970) and *Dowling v. United States*, 493 U.S. 342, 350 (1990)).

In the same way, Sattazahn's first jury could have failed to reach a verdict for reasons other than finding that the prosecution failed to meet its burden of proof. In fact, as stated previously, based on the jury's conviction at the guilt phase of first degree murder and robbery, it would be impossible to find that the jury had actually and necessarily decided that the Commonwealth had failed to prove the aggravating circumstance that the murder was committed in the perpetration of a felony.

In this case, Sattazahn, at the first mention of deadlock by the jury, immediately requested that the jury be discharged.[9] This request came after only three and one-half hours of deliberation on the very serious question of imposing the death penalty.[10] Sattazahn sought this jury dismissal even though he had, in effect, manipulated the evidence which the jury could hear by deferring his many other criminal cases until after the conclusion of this trial. He could thus argue to this jury that he had no significant history of prior criminal convictions. He had the option to request that this jury be encouraged to reach a verdict - a conviction or acquittal on the merits for death. He

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[9]"[A motion for mistrial] by the defendant is deemed to be a deliberate election on his part to forgo his valued right to have his guilt or innocence determined before the first trier of fact." *United States v. Scott*, 437 U.S. at 93.

[10]This Court has recognized both that the object of the jury system is to secure unanimity among the jurors based on the comparison of view and argument among the jurors, and that "...in a capital sentencing proceeding, the Government has 'a strong interest in having the jury express the conscience of the community on the ultimate question of life or death.'" Therefore, this Court has approved the use of a supplemental charge to encourage a jury who reports a deadlock to engage in further deliberations. *Jones v. United States*, 527 U.S. 373, 382 (1999).

chose, however, to ask for the jury to be dismissed without reaching a verdict.

In rejecting the argument that a harsher sentence on retrial has a "chilling effect" on the defendant's right to appeal or collaterally attack his conviction, this Court stated that the Constitution does not forbid "every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights." *Chaffin v. Stynchcombe*, 412 U.S. 17, 30 (1973).

Sattazahn had choices to make during and after his first trial. Sattazahn chose to delay his other criminal cases so that he could argue as mitigating circumstances to the first jury that he had no significant criminal record. Although there had never been a finding that the government failed to prove its case against the death penalty since the jury had simply deadlocked, Sattazahn chose to ask that the jury be discharged and to appeal his conviction. Sattazahn pursued and obtained the "clean slate" promised by *North Carolina v. Pearce*, 395 U.S. 711. According to *Poland*, when there has been "no death penalty acquittal," "[t]he Double Jeopardy Clause d[oes] not foreclose a second sentencing hearing at which the 'clean slate' rule applied." *Poland*, 476 U.S. at 157. The government, in a situation where the defendant has never been acquitted on the merits of the death penalty, is permitted to pursue society's interest in punishing the defendant whose guilt of first degree murder is clear after he obtains that clean slate. *(See Pearce*, 395 U.S. at 721 n.18).

Although the primary evil that double jeopardy guards against is successive prosecutions, in this case, Sattazahn sought the retrial. He requested and received the opportunity for a new jeopardy to attach so that he could have a new trial. To permit a new sentencing proceeding as part of the new jeopardy does not violate the Double Jeopardy Clause. Society

should not lose the right to seek the appropriate punishment for the crime Sattazahn committed when there has never been a finding that the government failed to prove that death was the appropriate punishment for the defendant's crime.

II. Pennsylvania law does not create a life and liberty interest in a life sentence imposed as a result of a deadlocked jury that survives the grant of a new trial on appeal.

The substance of Petitioner's due process claim appears to be not only that the Pennsylvania Death Penalty Statute gives him a life and liberty interest in the life sentence imposed by the judge after a jury deadlock, but also that this life and liberty interest in the life sentence is undisturbable for all time. This legal theory is unsupported in this Court's due process jurisprudence.

First, Sattazahn does not clearly explain how the life sentence he received is rendered immutable. Assuming *arguendo* that a life and liberty interest exists in this case under the reasoning of the cases cited by Petitioner, none of those cases suggest that such an interest is fixed in time. *Evitts v. Lucey*, 469 U.S. 387 (1985) (statutory right to appeal requires effective assistance of counsel; court did not hold that there must be a dismissal rather than a second appeal); *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980) (statutory right to sentencing by jury creates liberty interest for defendant in jury being informed of all sentences it is authorized to impose; court did not hold that re-sentencing could not be held); *Ford v. Wainwright*, 477 U.S. 399, 427-31 (1986) (O'Connor, J., concurring) (Florida law created liberty interest in not being executed while incompetent but did not bar execution forever and triggers minimal due process demands); *Ohio Adult Parole Authority v. Woodward*, 477 U.S. 272, 288-89 (1998) (O'Connor, Jr., with Souter, Ginsburg & Breyer, JJ., concurring) (inmate seeking clemency must be accorded some minimal procedural

safeguards but notice and opportunity to be heard satisfied requirement).

The Commonwealth suggests that the only legal theory that would support an immutable interest in a life sentence is found in double jeopardy jurisprudence. The Due Process Clause simply does not bestow such permanence to a sentence imposed before a defendant obtains a retrial. *See Bullington v. Missouri*, 451 U.S. 430 (retrial seeking death barred by Double Jeopardy Clause when first jury acquitted the defendant of death); *Arizona v. Rumsey*, 467 U.S. 203 (retrial seeking death barred by Double Jeopardy Clause when first jury acquitted the defendant of death). *Compare North Carolina v. Pearce*, 395 U.S. 711 (due process forbids vindictiveness against defendant in sentencing at retrial but does not forbid the imposition of a higher sentence); *Chaffin v. Stynchombe*, 412 U.S. 17 (due process does not forbid the possibility of a higher sentence on retrial). Therefore, any claim that Sattazahn has an irrefutable right to the life sentence must be addressed in terms of the protection of the Double Jeopardy Clause, not the Due Process Clause.

Secondly, the Pennsylvania legislature did not create a life and liberty interest for Sattazahn in the default life sentence imposed by a judge when the jury was discharged at Sattazahn's request after it deadlocked in the penalty phase of his trial. The imposition of the default life sentence was simply a ministerial act by the judge, "'based on [no] findings which resolve some factual matter, [and] is not sufficient to establish legal entitlement to a life sentence.'" *Commonwealth v. Sattazahn*, 563 Pa. at 548, 763 A.2d at 367 (quoting *Commonwealth v. Martorano*, 535 Pa. at 194, 634 A.2d at 1070). The provision for a default sentence in the death penalty statute in the event of a deadlocked jury does not, in and of itself, create any life and liberty interest in the defendant.

In the event that this Court believes that such a life and liberty interest was created by the statute, the Commonwealth contends that any life and liberty interest created by the statute does not survive the vacation of the original default life sentence. At most, the defendant had a life and liberty interest in the imposition of a life sentence in the event of a deadlock by the jury on death. Sattazahn received that life sentence. Once he obtained a new trial on appeal, he no longer had any life and liberty interest in a sentence imposed at his first trial. Nothing in due process jurisprudence says that a life and liberty interest once created can never be disturbed. The law merely states that, once a protected interest is found, the amount of process due is determined by considering the private interest that will be affected by official action, the risk of erroneous deprivation through the procedures used, and the government's interest in its action. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). The greater the potential deprivation of private interest, the greater the process due. *Id.*, 424 U.S. at 341.

The Pennsylvania legislature established sentencing procedures for jury trials when the verdict of first degree murder is returned by the jury. 42 Pa.C.S. § 9711(a)(1)[11] The clear language of this statute provides that a death penalty proceeding is mandated following a first degree murder

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[11]**§ 9711. Sentencing procedure for murder of the first degree**

(a) Procedure in jury trials.–

(1) After a verdict of murder of the first degree is recorded and before the jury is discharged, the court shall conduct a separate sentencing hearing in which the jury shall determine whether the defendant shall be sentenced to death or life imprisonment.

conviction.[12] The Pennsylvania legislature made no distinction between a first trial and a retrial in requiring a death penalty proceeding after a first degree murder conviction.

The statute also addresses how the court shall instruct the jury with regard to a sentencing verdict.[13] 42 Pa.C.S. § 9711(c)(1)(iv). For a verdict to be returned by the jury, there must be unanimity. The Pennsylvania Rules of Criminal Procedure further provide that there must also be specific findings by the jury as to the basis of the verdict, whether it is life or death. Pa.R.Crim.P. 358A, 42 Pa.C.S.[14]

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[12]The Commonwealth may determine that there are no aggravating circumstances in a particular case and thus choose not to seek the death penalty. That decision is the Commonwealth's decision to make. *See Commonwealth v. Buck*, 551 Pa. 184, 190, 709 A.2d 892, 895-96 (1998).

[13]**(c) Instructions to the jury.–**

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(iv) the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance specified in subsection (d) and no mitigating circumstance or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances. The verdict must be a sentence of life imprisonment in all other cases.

42 Pa.C.S. § 9711(c)(1)(iv).

[14]Rule 358A of the Pennsylvania Rules of Criminal Procedure was adopted February 1, 1989, effective July 1, 1989, and was renumbered as Rule 807, effective April 1; 2001.

The Pennsylvania legislature also provided that, if the jury is unable to reach a verdict, the judge may discharge the jury and shall impose a life sentence. 42 Pa.C.S. § 9711(c)(1)(v)[15] This portion of the statute does not address the effect that entry of a default life sentence following a first trial has upon the availability of the death penalty following a retrial. Importantly, it never refers to the entry of the life sentence in this situation as a verdict.

The Supreme Court of Pennsylvania has reviewed the statute and interpreted its provisions to specifically make a distinction between the life sentence imposed as a result of a unanimous jury verdict and that imposed as a result of a jury deadlock. In *Martorano* and then in *Sattazahn*, the state court recognized that subsection (iv) specifies the possible jury verdicts that can be entered after conviction for first degree murder and that subsection (v) specifies the procedure to be followed when there was no jury verdict. *Sattazahn*, 563 Pa. at 549, 763 A.2d at 368 (quoting *Martorano*, 535 Pa. at 197-98, 634 A.2d at 1072). The *Martorano* court stated that, reading both sections together and in their entirety, "[i]f the jury's failure to reach a unanimous agreement as to sentence could function as a verdict, subsection (v) would be superfluous" because when there is a verdict, the court does not discharge the jury, but

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[15](c) Instructions to the jury.–

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(v) the court may, in its discretion, discharge the jury if it is of the opinion that further deliberation will not result in a unanimous agreement as to sentence, in which case the court shall sentence the defendant to life imprisonment.

42 Pa.C.S. § 9711(c)(1)(v)

receives and records the verdict, imposing the sentence fixed by the jury. *Sattazahn*, 563 Pa. at 549, 763 A.2d at 367-68 (quoting *Martorano*, 535 Pa. at 197-98, 634 A.2d at 1072-73).

This interpretation of the state statute by the highest court in the state comports with principles of statutory construction under both state and federal law. (*See* 1 Pa.C.S. § 1922(2); *Commonwealth v. Sitkin's Junk Co.*, 412 Pa. 132, 194 A.2d 199 (1963) (in construction of a statute, it is presumed that every word, sentence or provision therein is intended for some purpose and accordingly must be given effect); *Duncan v. Walker*, 533 U.S. 167 (2001) (where Congress includes particular language in one section of a statute but omits it in another section of the same statute, it is generally presumed that Congress acts intentionally and purposely in this inclusion or exclusion)).

Based on its review of the Pennsylvania death penalty statute, the Supreme Court of Pennsylvania found that nothing in the statute precluded imposition of the death penalty upon re-conviction, as long as the sentencer found sufficient evidence to warrant it. The state court reasoned that, since the judge in imposing the mandatory sentence makes no findings which resolve some factual matter, the defendant had no legal entitlement to a life sentence under the Pennsylvania capital sentencing statute. *Sattazahn*, 563 Pa. at 763 A.2d at 368 (quoting *Martorano*, 535 Pa. at 194, 634 A.2d at 1070).

Yet Sattazahn claims that the Pennsylvania statute gave him a substantial and legitimate expectation that, after he received a judicially imposed "directed verdict for life" resulting from a non-unanimous jury, he would not later be subject to death for the first degree murder he committed. Petitioner's Brief, at 37. He bases his argument on: (1) the fact that the jury was instructed that the judge would impose life if they were deadlocked; (2) the mandatory nature of the

imposition of the life sentence upon deadlock; (3) the fact that Pennsylvania makes no statutory distinction of any kind between the treatment of life sentences imposed by "judicially directed verdicts" and a jury's unanimous verdict; and (4) the failure to inform the jury or the defendant that a successful appeal could render the life sentence imposed a nullity. *Id.*, at 37-38.

First, as noted above, nowhere does the statute refer to the life sentence mandated by a deadlocked jury as a verdict, therefore, the defendant's reference to a "directed verdict for life" and to "judicially directed verdicts" is misleading. Second, the reasons offered by the defendant fail to establish any ongoing life or liberty interest in the life sentence imposed at his first trial.

The first and fourth reasons offered by Sattazahn are that the judge instructed the jury that, if the jury could not reach a verdict, the court would impose a life sentence and that the judge did not instruct the jury that, if the defendant appealed and won, the Commonwealth might again seek the death penalty. As this Court has recognized, an instruction as to the consequences of the jury's failure to agree "has no bearing on the jury's role in the sentencing process. Rather, it speaks to what happens in the event that the jury is unable to fulfill its role--when deliberations break down and the jury is unable to produce a unanimous sentence recommendation." *Jones v. United States*, 527 U.S. at 382. To suggest, as does Sattazahn, that a jury who decided not to fulfill its role and follow its oath thereby created a life and liberty interest in the defendant as to the result of that failure makes a mockery of the judicial system.

The trial judge instructed the jury that it had to reach a unanimous agreement on a death sentence and that, if it could not agree unanimously on death, it had two immediate options

- to continue deliberating or, if all of them agreed, to stop deliberating and sentence the defendant to life. J.A., 18. Only after conscientious and thorough deliberations, should the jurors report to the judge that they were unable to reach a verdict. J.A., 18. Sattazahn suggests that the instruction that the judge will impose life if the jury fails to reach a unanimous verdict removes the incentive for the jury to conduct proper deliberations. He further suggests that the failure of the court to tell the jury that, if the defendant appealed and won, the Commonwealth could again seek the death penalty, provides no notice that the sentence might change.

Nothing in the Pennsylvania statute supports this subjective reading of the court's instructions. The statute simply informs the jury what will occur procedurally if the jury does not reach a unanimous agreement as to sentence. The instruction does not relieve the jury of its duty to deliberate and should not be so construed.

Furthermore, Sattazahn's jury was given no information concerning the effect subsequent appeals might have on the permanency of the sentence they imposed. Nothing in the sentencing statute or Pennsylvania Suggested Standard Jury Instructions requires, provides or even allows such information to be communicated to the jury. To argue that such should occur would break with all prior history of the Commonwealth.

Sattazahn himself received notice from the language of the statute itself that a death penalty proceeding is mandated following a first degree murder conviction. 42 Pa.C.S. § 9711(a)(1). In addition, the Supreme Court of Pennsylvania has specifically held that its interpretation of the death penalty statute demonstrates that the Pennsylvania legislature did not regard a life sentence imposed due to a deadlocked jury as equal to a jury unanimous verdict of life imprisonment.

Sattazahn, 563 Pa. at 548-49, 763 A.2d at 367-68 (quoting *Martorano*, 535 Pa. at 199, 634 A.2d at 1072).

The Pennsylvania death penalty statute does not exist in a vacuum. Interpretations of acquittals, double jeopardy and higher sentences upon retrial abound in federal case law and did so at the time Sattazahn was tried, appealed and was retried. *(See North Carolina v. Pearce*, 395 U.S. 711; *Chaffin v. Stynchcombe*, 412 U.S. 17; *Richardson v. United States*, 468 U.S. 317; *Poland v. Arizona*, 476 U.S. 147; *Schiro v. Farley*, 510 U.S. 222). The Supreme Court of Pennsylvania has held that the double jeopardy provisions of the Pennsylvania and United States Constitutions involve the same meaning, purpose and end. *Commonwealth v. McCane*, 517 Pa. 489, 500 n.5, 539 A.2d 340, 346 n.5 (1988). To claim that the failure of the first trial court to notify the jury that, if the defendant appealed, he may again face the death penalty created some life and liberty interest in Sattazahn to the life sentence imposed as a result of a deadlocked jury, ignores many other clear notices of that fact.

Sattazahn also claims that the mandatory nature of the imposition of the life sentence upon deadlock creates in him a life and liberty interest in the life sentence imposed. The Commonwealth would agree that, at the time the jury is deadlocked, the statute creates in the defendant a life and liberty interest in the imposition of a life sentence, according to the dictates of the statute. The default provision in the statute protects severely limited judicial resources. If a new penalty proceeding were held every time a death penalty jury deadlocked, the entire trial would almost always have to be retried before a newly empaneled jury since the government generally incorporates all the trial testimony into the penalty proceeding. Therefore, the default provision makes good sense in the event of a deadlocked jury. Making it mandatory maintains the necessary consistency in death penalty proceedings.

However, if a new trial is ordered at the request of the defendant, then all the resources required to conduct the second penalty proceeding will be in place for the new trial. Since the defendant has never been acquitted of death, there is no constitutional bar to conducting a second penalty proceeding after the second trial. The legislative decision to provide for a default life sentence does not in any way show an intent to preclude the death penalty on retrial. *See Sattazahn*, 563 Pa. at 549, 763 A.2d at 368 (quoting *Martorano*, 535 Pa. at 199, 634 A.2d at 1072). In fact, 42 Pa.C.S. § 9711(a)(1) mandates a death penalty proceeding whenever a jury returns a first degree murder verdict. Therefore, the mandatory nature of the default provision does not support Sattazahn's claim.

The last argument Sattazahn makes to establish his life and liberty interest in the default life sentence imposed by the judge when the jury deadlocked is the fact that Pennsylvania makes no statutory distinction of any kind between the treatment of life sentences imposed by "judicially directed verdicts" and a jury's unanimous verdict. To the contrary, the Supreme Court of Pennsylvania has specifically held that the Pennsylvania legislature did not regard a life sentence imposed due to a deadlocked jury as equal to a jury's unanimous verdict of life imprisonment, and distinguished them within the statute. *Sattazahn*, 563 Pa. at 548-49, 763 A.2d at 367-68 (quoting *Martorano*, 535 Pa. at 199, 634 A.2d at 1072). As the final arbiter of Pennsylvania law, the Supreme Court of Pennsylvania's interpretation of Pennsylvania law is binding on Sattazahn. *Brady v. Maryland*, 373 U.S. 83, 90 (1963).

There are two very distinct processes outlined in the statute for arriving at a life sentence - a unanimous jury verdict in favor of life and a default provision upon the jury's deadlock. Logically, they cannot be viewed as the same thing. If they were the same thing, then 42 Pa.C.S. § 9711(c)(1) would have stopped at subsection (iv) where it provides: "The verdict must

be a sentence of life imprisonment in all other cases." However, the legislature did not stop there. It added a provision in (v) that specifically takes a sentence imposed as a result of a deadlocked jury out of the "verdict" provision of the statute. In addition, in the judge imposed life sentence, there is no requirement that any findings be made. Since the statute does in fact differentiate between a life sentence imposed by the judge and a unanimous verdict for life returned by a jury, this argument must fail.

When a state provides for a jury to impose criminal punishment, the defendant has "a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion." *Hicks v. Oklahoma*, 447 U.S. at 346. Therefore, he has a liberty interest in the jury's being informed of all the sentences which it can impose. *United States v. Jones*, 287 F.3d 325, 331 (5th Cir. 2002) (citing *to Hicks*, 447 U.S. 343, 346). Sattazahn's jury was informed that it could by unanimous agreement sentence him to life imprisonment or death.

When a state chooses to create procedures which have an integral role in the system for finally adjudicating the guilt or innocence of a defendant, the procedures used must comply with due process. *Ohio v. Woodward*, 523 U.S. at 278. Therefore, since Pennsylvania chooses to have a death penalty, its procedures must comport with the Due Process Clause.

Sattazahn's due process claim centers on a showing that the statute created an undisturbable individual right for him in a life sentence imposed as the result of a deadlocked jury. The only right the Pennsylvania death penalty statute created with regard to the default life sentence was that it be imposed in the event of a deadlocked jury. The life sentence was imposed pursuant to the statute's requirements. Due process protected Sattazahn from any arbitrary imposition of the death penalty at

both trials through the full panoply of pretrial, trial and appellate procedures for both the guilt and penalty phases. However, neither the Due Process Clause nor the Pennsylvania statute created any entitlement to a life sentence in Sattazahn beyond the first trial.

CONCLUSION

For all the reasons offered above, the Commonwealth of Pennsylvania respectfully requests that this Court affirm the sentence of death imposed upon David Sattazahn.

Respectfully submitted,

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In The Supreme Court of the United States

DAVID ALLEN SATTAZAHN,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Pennsylvania

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ARGUMENT

I. Respondent Admits That Petitioner is Entitled to Double Jeopardy Analysis Under *Bullington v. Missouri*; Under *Bullington*, the Double Jeopardy Clause is Violated Whenever – As Here – a Defendant Who Received a Life Sentence in His Initial Trial-Like Capital Sentencing Proceeding is Subjected to Successive Capital Sentencing Proceedings.

Respondent concedes "that the capital sentencing procedure in Pennsylvania resembles a trial for double jeopardy purposes, just as the Missouri and Arizona sentencing proceedings in *Bullington* and *Rumsey*, and that the procedure, therefore, triggers the need to determine if protection is available under the Double Jeopardy Clause." *Respondent's Brief* at 13. This concession is dispositive because the imposition of a life sentence after a capital sentencing proceeding that bears "the hallmarks of [a] trial on guilt or innocence," *Bullington v. Missouri*, 451 U.S. 430, 439 (1981), triggers the protections of the Double Jeopardy Clause.[1] The life sentence imposed after the completed capital sentencing hearing in this case is a judgment[2] like the sentences at issue in *Bullington* and

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[1] *See Initial Brief* at 19-23; *Arizona v. Rumsey*, 467 U.S. 203, 210 (1984) ("In short, a sentence imposed after a completed Arizona capital sentencing hearing is a judgment like the sentence at issue in *Bullington v. Missouri*, which this Court held triggers the protections of the Double Jeopardy Clause.").

[2] *See Commonwealth v. Sattazahn*, 563 Pa. 533, 548, 763 A.2d 359, 367 (2000), J.A. at 103 (describing the life sentence imposed in this case as a statutorily mandated "default judgment"); *Commonwealth v. Martorano*, 535 Pa. 178, 194, 634 A.2d 1063, 1070 (1993); *see also*

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Rumsey, and so subjecting Petitioner to the death penalty on his retrial violated double jeopardy.

Respondent and Amicus, the United States of America, try to avoid this straightforward application of *Bullington* by labeling *Bullington* a "narrow" rule and invoking two inapplicable lines of continuing jeopardy cases: the "clean slate" doctrine of *Stroud v. United States*, 251 U.S. 15 (1919), permitting retrial of a defendant who overturns his conviction, including potentially harsher resentencing of that defendant, depending upon the nature of the applicable sentence and of the original sentencing proceedings;[3] and a line of cases permitting retrial when a hung jury creates manifest necessity for a mistrial that prevents the entry of a judgment of verdict or sentence.

As set forth below and throughout Petitioner's *Initial Brief*, Respondent's and Amicus's conclusion and the premises from which it arises have no basis in *Bullington* or any other double jeopardy decision of this Court that applies to trial-like capital sentencing proceedings concluded in a defendant's favor.

Amicus Brief at 17 ("the trial court entered judgment after discharging a deadlocked jury").

[3] Whenever the original sentencing proceedings do not provide trial-like protections, the prosecution may seek any statutorily prescribed sentence on retrial. When the original sentencing proceedings were trial-like, however, the State may seek a harsher punishment only when those initial proceedings were non-capital in nature.

A. *Bullington*'s Double Jeopardy Rule is "Narrow" Because it Applies Only to Trial-Like Capital Sentencing Proceedings; But With Respect to Those Proceedings, It – and Not the "Clean Slate" Doctrine – Applies Whenever a Defendant Receives a Life Sentence.

The United States asserts that "[l]ater decisions make clear that Bullington established a 'narrow exception'" to the general rule that a defendant who overturns his conviction on appeal faces a "clean slate" in which he may, if reconvicted, face a harsher sentence. *Amicus Brief* at 13 (quoting *Monge v. California*, 524 U.S. 721, 730 (1998)).

What these later decisions actually make clear – including the case the United States cites – is that *Bullington*'s "narrowness" arises out of its inapplicability to non-capital cases, not any limited application within capital cases. *Lockhart v. Nelson*, 488 U.S. 33, 37 n.6 (1988) (declining to reach question of whether to *expand Bullington* to non-capital sentencing proceedings); *Caspari v. Bohlen*, 510 U.S. 383 (1994) (holding that extending *Bullington* to non-capital sentencing proceedings would constitute new rule of law); *Monge v. California*, 524 U.S. 721, 726 (1998) (declining to extend *Bullington* to non-capital sentencing proceedings).[4]

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[4] Indeed, this is precisely what the United States has argued to this Court in prior double jeopardy cases. *See Monge v. California*, 1998 WL 222955, *48-*49 (April 28, 1998) (oral argument of Amicus Curiae, the United States of America); *Caspari v. Bohlen*, 1993 WL 757639, *19 (December 6, 1993) (oral argument of Amicus Curiae, the United States of America) ("Our position is that Bullington ought not to be extended

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As to capital cases, however, *Bullington* applies precisely as Petitioner has described. *Caspari*, 510 U.S. at 386 (O'Connor, J., for eight Justices)[5] ("In *Bullington v. Missouri*, 451 U.S. 430 (1981), we held that a defendant sentenced to life imprisonment following a trial-like capital sentencing proceeding is protected by the Double Jeopardy Clause against imposition of the death penalty if he obtains reversal of his conviction and is retried and reconvicted."); *see Monge*, 524 U.S. at 726 ("In *Bullington*, we held that a capital defendant who had received a life sentence during a penalty phase that bore 'the hallmarks of [a] trial on guilt or innocence' could not be resentenced to death upon retrial following appeal."); *Lockhart*, 488 U.S. at 37 n.6 (describing *Bullington* as "the rule that the Double Jeopardy Clause limits the State's power to subject a defendant to successive capital sentencing proceedings"); *Spaziano v. Florida*, 468 U.S. 447, 458 (1984) ("the Court has concluded that the Double Jeopardy Clause bars the State from making repeated efforts to persuade a sentencer to impose the death penalty").

In the words of the United States to this Court:

> [T]he rationale of *Bullington* was that because there was this full trial-like process and because it was a question of life or death, an up-down, yes-no question, then the Court was willing to

outside the capital context; i.e. the context where life or death determinations are made after a full trial-like process.").

[5] Justice Stevens dissented not because he disagreed with the Court's articulation of the *Bullington* holding, but because he would have extended *Bullington* to trial-like *non-capital* sentencing proceedings. *Caspari*, 510 U.S. at 397-98.

> treat the outcome of that proceeding as though it were a verdict on the question of life or death, i.e. innocent or guilty.
>
> That analysis stands alone in this Court's sentencing cases relating to double jeopardy. . . . [T]he context in which it arose [was] where there was a full trial-like procedure with an ultimate determination of life or death.

Caspari v. Bohlen, 1993 WL 757639, at *21-*22; *see also id.* at *19 (Bullington applies in "the capital context; i.e. the context where life or death determinations are made after a full trial-like process").[6]

The Double Jeopardy Clause applies to life sentences imposed in modern trial-like capital sentencing proceedings because, under the Eighth Amendment, the unique severity and finality of the death penalty requires heightened procedural safeguards to assure the accuracy and

[6] Contrary to Respondent's misapprehension, *see Respondent's Brief* at 23-24, Petitioner has never argued that the imposition of a life sentence in *any* capital trial invariably triggers double jeopardy protections. *See, e.g., Stroud v. United States*, 251 U.S. 15 (1919) (non-trial like sentencing). It is *the combination* of the facts that death is a categorically different type of sentence than any other and that the trial-like nature of the sentencing proceedings in *Bullington*, *Rumsey*, and this case are unlike typical sentencing proceedings. *Monge v. California*, 524 U.S. at 733 ("*Bullington* turns on *both* the trial-like proceedings at issue and the severity of the penalty at stake."); *Caspari v. Bohlen*, 510 U.S. at 392 ("Both *Bullington* and *Rumsey* were capital cases, and our reasoning in those cases was based largely on the unique circumstances of a capital sentencing proceeding."); *Schiro v. Farley*, 510 U.S. 222, 231 (1994) ("[b]ecause the capital sentencing proceeding 'was itself a trial on the issue of punishment,' requiring a defendant to submit to a second, identical proceeding was tantamount to permitting a second prosecution of an acquitted defendant'" (quoting *Bullington*, 451 U.S. at 446).

reliability of the sentence ultimately imposed, and a sentencing proceeding that bears "the hallmarks of [a] trial on guilt or innocence," *Bullington*, 451 U.S. at 439, is one such safeguard. Thus, "the nature and the consequences of capital sentencing proceedings are intertwined," and "*Bullington* [is] an example of the heightened procedural protections accorded capital defendants." *Monge*, 524 U.S. at 733, 734; *cf. Strickland v. Washington*, 466 U.S. 668, 686-87 (1984); *Spaziano*, 468 U.S. at 458.

Indeed, the implications of these safeguards have been a principal basis upon which this Court has repeatedly distinguished life sentences returned after a capital penalty-phase trial from sentences in non-capital cases.[7] "[T]he decisions of this Court 'clearly establish that a sentenc[ing *in a noncapital case*] does not have the qualities of constitutional finality that attend an acquittal.'" *Pennsylvania v. Goldhammer*, 474 U.S. 28, 30 (1985) (per curiam) (quoting *United States v. DiFrancesco*, 449 U.S. 117, 134 (1980)), *quoted in Caspari*, 510 U.S. at 392

[7] Because heightened safeguards against the erroneous imposition of a death sentence are a significant part of the reason that the Double Jeopardy Clause applies in capital sentencing proceedings, it would be illogical and unreasonable to then withhold double jeopardy protection when the defendant's life sentence is the product of a safeguard – jury lifelock – that has been adopted by most death penalty jurisdictions. *See Jones v. United States*, 527 U.S. 373, 419 (1999) (Ginsburg, J., dissenting) (citing Acker & Lanier, *Law, Discretion, and the Capital Jury: Death Penalty Statutes and Proposals for Reform*, 32 CRIM. L. BULL. 134, 169 (1996) ("In twenty-five of the twenty-nine states in which capital juries have final sentencing authority, . . . a deadlocked sentencing jury is transformed into a 'lifelocked' jury. That is, the jury's inability to produce a unanimous penalty-phase verdict results in the defendant's being sentenced to life imprisonment or life imprisonment without parole.").

(bracketed phrase added by the *Goldhammer* Court; emphasis in *Caspari*). But *because* death is different; *because* "the sentencing procedures for capital cases instituted after the decision in *Furman* [*v. Georgia*, 408 U.S. 238 (1972),] are unique," *Bullington*, 451 U.S. at 441 n.15; and *because* that uniqueness encompasses the heightened procedural requirements of a trial-like proceeding, the imposition of a life sentence at the conclusion of the penalty trial carries with it a procedural finality that is constitutionally significant.

Simply put, this Court has repeatedly stated that a "refusal to impose the death penalty operate[s] as an acquittal of that punishment." *Caspari*, 510 U.S. at 392; *see also Initial Brief* at 22-23, 25-29 (citing *Schiro v. Farley*, 510 U.S. 222, 232 (1994); *Poland v. Arizona*, 476 U.S. 147, 152 (1986); *Smalis v. Pennsylvania*, 476 U.S. 140, 145 n.8 (1986); *Arizona v. Rumsey*, 467 U.S. 203, 211 (1984); *Bullington v. Missouri*, 451 U.S. 430, 445-46 (1981)).

The rule in *Bullington* applies to all life sentences imposed after completion of capital sentencing proceedings that bear the hallmarks of a trial. It does not parsimoniously evaluate how a life sentence was imposed as a precondition for granting double jeopardy protection. The entire thrust of *Bullington* is that *Stroud v. United States*, 251 U.S. 15 (1919), and its "clean slate" rule do not apply to capital sentencing proceedings that bear those hallmarks.[8] *Bullington*, 451 U.S. at 432-35; *Arizona v. Rumsey*,

[8] In *Stroud*'s case, the applicable sentencing statute stated that: "Every person guilty of murder in the first degree shall suffer death," but "the jury may qualify their verdict by adding thereto 'without

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467 U.S. 203, 209-11 (1984). Amicus acknowledges that "changes in this Court's capital jurisprudence have limited Stroud's application." *Amicus Brief* at 11. As the previous discussion demonstrates, that "limitation" is in fact an abrogation.

Respondent concedes, and the Amicus does not dispute, that Pennsylvania's capital sentencing scheme is materially indistinguishable from those of Missouri and Arizona, which trigger double jeopardy protections. For all the same reasons, this case is distinguishable from *Stroud*. When a defendant who has been subjected to an initial trial-like capital sentencing proceeding and emerged with a life sentence later obtains reversal of his conviction and is retried and reconvicted, *Bullington* applies and *Stroud* has no application.

B. Respondent's and Amicus's Reliance on Hung Jury Cases is Misplaced; Although Double Jeopardy Protections Do Not Require an Acquittal on the Merits, Petitioner's Life Sentence Was a Determination That He Did Not Deserve the Death Penalty As a Matter of Law and Constituted an Acquittal.

Respondent and the United States also erroneously rely on *United States v. Perez*, 22 U.S. (9 Wheat.) 579

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capital punishment'; and whenever the jury shall return a verdict qualified as aforesaid, the person convicted shall be sentenced to imprisonment for life." *See Bullington*, 451 U.S. at 439 n.11. The juries in the trials of the famous Birdman of Alcatraz were given no further guidance as to how to determine the appropriate penalty. *Id.*

(1824), and its line of mistrial cases to argue that Petitioner's life sentence – imposed as a matter of law when the jury deadlocked 9-3 in favor of life – is not an acquittal barring retrial under the Double Jeopardy Clause. *Respondent's Brief* at 7, 21, 23; *Amicus Brief* at 16. Respondent notes that jury non-unanimity has "traditionally resulted in a hung jury at a trial," at 21, and quoting *Richardson v. United States*, 468 U.S. 317, 325 (1984), that "the failure of a jury to reach a verdict is not an event which terminates jeopardy." However, Respondents and Amicus overlook a central point in all these cases: the jury deadlock resulted in *mistrials* that prevented the cases from reaching completion.

Yet, under Pennsylvania's capital sentencing statute, jury deadlock does *not* produce the "traditional" mistrial. Instead, by operation of law, "a deadlocked sentencing jury is transformed into a 'lifelocked' jury" that produces a final sentencing judgment. Acker & Lanier, *Law, Discretion, and the Capital Jury: Death Penalty Statutes and Proposals for Reform*, 32 CRIM. L. BULL. 134, 169 (1996). The resulting life sentence is a final judgment – an acquittal of death – which is an event that terminates jeopardy.

Even the mistrial cases acknowledge that when "the innocence of the accused has been confirmed by a final judgment, the Constitution conclusively presumes that a second trial would be unfair." *Arizona v. Washington*, 434 U.S. 497, 503 (1978). Where a trial or trial-like capital sentencing proceeding "terminates with a judgment of acquittal . . . 'double jeopardy principles governing the permissibility of retrial after a declaration of mistrial' have

no bearing." *Sanabria v. United States*, 437 U.S. 54 (1978).[9]

Respondent's and Amicus's argument that Petitioner must demonstrate that he was "acquitted on the merits" or his life sentence is not protected by the Double Jeopardy Clause, *Respondent's Brief* at 7, 11, 16-17, 26; *Amicus Brief* at 12-20, is a non-starter. There is simply no difference for double jeopardy purposes between an "acquittal on the merits" as contemplated by Respondent and the Amicus and an "acquittal-by-operation-of-law" such as occurs when a statute (such as Pennsylvania's) prescribes that the legal consequences of jury disagreement is the imposition of a life sentence.

Moreover, actual acquittal on the merits has never been the sole prerequisite for double jeopardy protections. Jeopardy is terminated and retrial barred "where the first trial had terminated in a manner favorable to the defendant because of jury verdict or because of judicial action." *United States v. Jorn*, 400 U.S. 470, 475 (1971). This includes *any* acquittal, no matter how 'egregious' or

[9] Moreover, a mistrial bars retrial only if there is manifest necessity for halting the trial. *Richardson*, 468 U.S. at 323-24 (quoting *Perez*, 9 Wheat. at 580). This Court has unanimously held that when Congress has anticipated the possibility of jury deadlock and nonetheless provided for imposition of a life sentence by operation of law, the lack of juror unanimity does not create "good cause" to discharge the jury and impanel a new one. *Jones v. United States*, 527 U.S. 373, 381 (1999); *id.* at 418 (Ginsburg, J., dissenting). Although *Jones* involved statutory construction, it is hard to imagine how an act that provides no good cause to impanel a new jury can at the same time constitute manifest necessity for a mistrial.

erroneous;[10] judicial actions that are the functional equivalent of an acquittal;[11] and the premature termination of the proceedings without manifest necessity.[12]

In addition, while insufficiency of the evidence *requires* acquittal – hence this standard of acquittal for cases in which convictions are overturned on appeal – the State's failure to meet the burden of production, *Respondent's Brief* at 24, 26, has never been a necessary prerequisite to the attachment of double jeopardy.[13] A factfinder

[10] *E.g.*, *Sanabria v. United States*, 437 U.S. 54, 68-69, 75 (1978) (retrial barred where an "erroneous evidentiary ruling" that improperly excluded admissible evidence "led to an acquittal for insufficient evidence"); *Fong Foo v. United States*, 369 U.S. 141, 142-43 (1962) (per curiam) (retrial barred following the district court's erroneous direction to the jury to return verdicts of acquittal based upon a combination of perceived prosecutorial misconduct and the lack of credibility of the prosecution witnesses).

[11] *E.g.*, *Smalis v. Pennsylvania*, 476 U.S. 140, 145 (1986) (demurrer at close of prosecution's case, even if erroneously granted); *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 570 (1977) (directed verdict following discharge of hung jury); *Sisson v. United States*, 399 U.S. 267, 290 n.19 (1970) (judicially directed verdict of acquittal after court made "legal determination on the basis of facts adduced at the trial relating to the general issue of the case").

[12] *E.g.*, *Jorn*, 400 U.S. at 486 (jury discharged for "lack of preparedness by the Government to continue the trial"); *Downum v. United States*, 372 U.S. 734, 737-38 (1963) (jury discharged when prosecution witness essential to 2 of 6 counts had not been served with summons); *Gori v. United States*, 367 U.S. 364 (1961) (double jeopardy would bar discharge of jury "to help the prosecution, at a trial in which its case was going badly, by affording it another, more favorable opportunity to convict").

[13] Indeed, if it were, this Court could not have granted relief in either *Bullington* or *Rumsey*, in which the State in fact met its burden of production. The state court necessarily found that the evidence presented at Robert Bullington's first trial was sufficient to prove aggravating circumstances, for it would have permitted capital

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or capital sentencer may – and sometimes *must* – enter judgment in a defendant's behalf despite evidence sufficient to convict beyond a reasonable doubt.[14] Indeed, the language and logic of *Bullington* and *Rumsey* extend to all cases in which the sentencer has rejected the prosecution's case for death after a trial-like capital sentencing phase. *Poland*, 476 U.S. at 153 n.3 ("The analogy drawn was between a death sentence and a verdict of guilty, a life sentence and a verdict of innocent."). That rejection may or *may not* be based on a failure of proof with respect to some necessary precondition for a death sentence. Either way, double jeopardy applies.[15]

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resentencing on retrial although Missouri intended to present the exact same evidence it had presented in his first trial. *State ex rel. Westfall v. Mason*, 594 S.W.2d 9008, 925 (Mo. 1980) (Seiler, J., dissenting). And in *Rumsey*, the trial court erroneously rejected evidence that was sufficient to impose death.

[14] This can run the gamut from disbelieving the State's evidence or witnesses to jury nullification. In addition, state law may require acquittal for the failure to meet a higher burden of proof than constitutionally required; to meet a threshold burden of persuasion; or in any number of other possible scenarios in which the law directs the court or the jury to terminate the proceedings in the defendant's favor.

[15] Respondent also argues that the statutorily directed verdict of life is not an acquittal under *Bullington* and *Rumsey* because only "a decision by a jury, or by an appellate court, that the prosecution had failed to prove its case" can prevent a death-after-life capital resentencing, "[t]he trial court was not a decisionmaker at all, but rather an administrator of a statutorily compelled life sentence [and n]o findings of any kind were made, let alone findings sufficient to establish any legal entitlement to a life sentence." *Respondent's Brief* at 10, 21. As discussed more fully in the *Initial Brief* at 27-28, Pennsylvania's statute sets forth specific facts the trial court must find to establish legal entitlement to a life sentence. 42 Pa. C.S. § 9711(c)(1)(v). In any event, the trial court expressly "found" facts, N.T. 5/10/91, at 63, J.A. at 23, that established the Commonwealth's failure to prove its case for death as a matter of law.

Here, the trial court's finding that the sentencing jury could not reach unanimity was a determination as a matter of state law that the State had not sufficiently proven its case for death. That rejection of the State's case was "an acquittal on the merits"; the imposition of a life sentence in a trial-like capital sentencing proceeding was an "acquittal" of death; and whether or not the statutorily mandated life sentence is denominated an "acquittal," it was a final judgment that terminated Petitioner's jeopardy of death and triggered the protections of the Double Jeopardy Clause.

C. *Ring v. Arizona* Further Supports the *Bullington* Rule that the Imposition of Life Sentence is An Acquittal of the Death Penalty.

This Court decided *Ring v. Arizona*, 122 S. Ct. 2428 (2002), after Petitioner filed his *Initial Brief*. Petitioner disagrees with the Amicus's assertion that "Ring has no bearing" on this case. *Amicus Brief* at 14 n.5. True enough, *Ring* is not *necessary* to establish *Bullington*'s rule that, because death is constitutionally different, a life sentence imposed at the conclusion of a trial-like capital sentencing proceeding is an acquittal of the death penalty. Nonetheless, *Ring* confirms and *strengthens* that result.

Pennsylvania's statutory requirement of proving at least one aggravating circumstance before Petitioner could be death-eligible "[i]n effect . . . exposed [him] to a greater punishment than that authorized by the guilty verdict" alone. *Ring*, 122 S. Ct. at 2440. Consequently, Pennsylvania's first-degree murder statute can be said to "authorize[ ] a maximum penalty of death only in a formal sense, for it explicitly cross-references the statutory provision

requiring the finding of an aggravating circumstance before imposition of the death penalty." *Id.* (citation omitted). Thus, "whether the [sentencing] statute calls them elements of the offense, sentencing factors, or Mary Jane," *id.* at 2444 (Scalia, J., concurring), Pennsylvania's aggravating circumstances are "the functional equivalent of an element of a greater offense" – i.e., capital murder. *Id.* at 2443 (majority opinion).

That the sentencing determination is the functional equivalent of a greater offense necessarily entails that the crime of first-degree murder is a different, lesser offense. It also signals that the jeopardy of life a defendant faces in the trial-like penalty phase of a capital proceeding is separate and independent of the jeopardy of liberty he faced in the guilt phase. This stand-alone jeopardy, in turn, distinguishes these trial-like sentencing proceedings from traditional sentences that "do not place a defendant in jeopardy for an 'offense.'" *Monge v. California*, 524 U.S. 721, 728 (1998); *id.* at 729.

Since "capital murder" is a greater offense than first-degree murder, a final adjudication of life – by whatever means – is an acquittal of that offense. And if, as here, the stand-alone penalty-phase jeopardy has been terminated by a life verdict that cannot be appealed, the status of that acquittal cannot be affected by the outcome of an appeal of a different offense as to which the defendant faces continuing jeopardy. *Green v. United States*, 355 U.S. 184, 190-91 (1957). Thus, *Ring* enhances Petitioner's argument that when a statute has *Bullington*-style procedures for adjudicating the State's case for death, a favorable sentencing-phase decision on life or death is equivalent to an acquittal of death.

II. Respondent Admits that Petitioner Had a Life and Liberty Interest in the Statutorily Mandated Life Sentence the Trial Court Imposed When the Sentencing Jury in His First Trial Lifelocked; That Interest Necessarily Encompasses An Expectation in the Finality of His Life Sentence.[16]

Respondent concedes that

> When a state provides for a jury to impose criminal punishment, the defendant has "a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion." *Hicks v. Oklahoma*, 447 U.S. at 346.

Respondent's Brief at 40. It further agrees "that, at the time the jury is deadlocked, the [Pennsylvania capital sentencing] statute creates in the defendant a life and liberty interest in the imposition of a life sentence."-*Id.* at 38.

Respondent's concession that Pennsylvania's statute vested in Petitioner *some form* of life and liberty interest significantly narrows the issue before this Court. The sole issue now is the scope of that interest. Respondent argues that Petitioner's life and liberty interest in the statutorily mandatory directed life verdict resulting from the jury

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[16] The Amicus, United States of America, addresses a materially different due process question in its brief than the due process "life and liberty interest" question for which Petitioner sought and this Court granted certiorari. The Amicus's reformulation poses a due process issue that Petitioner did not raise in this Court, did not ask this Court to consider, and which Petitioner has not briefed. Petitioner's reply limits itself to the due process life and liberty interest issue actually before the Court.

lifelock is not "immutable" and "does not survive the vacation of the original life sentence." *Id.* at 30, 32.[17]

Petitioner's "substantial and legitimate expectation" in the life sentence he received in his first capital sentencing proceeding was not (as Respondent suggests) "only" in the "ministerial act" of having a life sentence imposed, *id.* at 40;[18] it was in the enforcement and finality of that sentence. That expectation is the same whether the ultimate decision-maker is the jury or the judge and whether the sentence is imposed by operation of law as a result of a unanimous jury verdict or by operation of law as a consequence of jury lifelock. As described in the *Initial Brief* (at 35-37), both outcomes are an integral part

[17] Respondent also concedes that Petitioner "has a liberty interest in the jury's being informed of all the sentences which it can impose," but suggests that there was no violation of Petitioner's life and liberty interest in this case because "Sattazahn's jury was informed that it could by unanimous agreement sentence him to life imprisonment or death." *Respondent's Brief* at 40. This argument, however, misses the point. Petitioner is not arguing that the life sentence he received in his first trial violated his life and liberty interest in a jury verdict based on the proper exercise of its statutory discretion. While Petitioner agrees with Respondent that such a life and liberty interest exists, its contours are not at issue in this case. What is at issue here is the enforcement in his second trial of his life and liberty interest in the *judicially directed verdict* of life that was properly imposed in the first trial.

[18] Contrary to Respondent's suggestion, the judge performs the same "ministerial act" when the jury reaches a unanimous life verdict. 42 Pa. C.S. § 9711(g) ("Recording sentencing verdict. – Whenever the jury shall agree upon a sentencing verdict, it shall be received and recorded by the court. The court shall thereafter impose upon the defendant the sentence fixed by the jury."), and Respondent surely would not contend that the expectations of a defendant who received a life sentence from the jury would be limited to having the court formally pronounce and impose that sentence.

of the Commonwealth's system of finally adjudicating life or death, and both are statutorily mandated.[19]

In addition, trial-like capital sentencing proceedings have "qualities of constitutional finality" not present in non-capital cases. *See supra* at 6-7. The defendant in such proceedings has a substantial and legitimate expectation that, if a lifelocked jury produces a mandatory life sentence, he will be deprived only of his liberty and not of his life.

Further, Respondent's assertion that Petitioner's expectation of finality "does not survive the vacation of the original life sentence" is both unfounded and a misnomer. Petitioner did not vacate his life sentence; he overturned his conviction.[20] Moreover, he did not and Pennsylvania as a matter of law *could not* appeal his life sentence. *Initial Brief* at 36-37. With nothing to be vacated, there was no intervening act for the life sentence to survive. Instead, the statutory unavailability of appellate review of a life

[19] There is no support for Respondent's argument that the Pennsylvania sentencing statute treats life sentences differently depending upon whether they are the product of a unanimous jury verdict or a statutorily directed judicial verdict. The sole substantive reference to life verdicts in Pennsylvania's sentencing statute does not distinguish between the two. 42 Pa. C.S. § 9711(c)(1)(iv) ("The verdict must be a sentence of life imprisonment in all other cases."). The remaining sections dealing with life sentences either tell the jury to fill out the verdict form when it has reached a unanimous verdict, 42 Pa. C.S. § 9711(f), or set forth the mechanisms by which the court must impose that sentence, 42 Pa. C.S. § 9711(c)(1)(v) (lifelocked jury); 42 Pa. C.S. § 9711(g) (unanimous jury).

[20] If it were otherwise, a life verdict from a unanimous capital sentencing jury also would not survive reversal of a first-degree conviction.

sentence provided yet additional expectation of its finality, *cf. United States v. DiFrancesco*, 449 U.S. 117, 139 (1980) (where the legislature "has specifically provided that the sentence is subject to appeal . . . there can be no expectation of finality in the original sentence"), particularly in a legislative scheme in which the sentencing trial was a separate proceeding adjudicating the functional equivalent of a separate offense. *Ring v. Arizona*, 122 S. Ct. 2428, 2243 (2002).

Finally, Respondent contends that this Court's life and liberty interest cases recognize only transient procedural protections, and do not carry over to subsequent proceedings. But that is only because the violations presented to the Court thus far involve deprivations of the original process, so there is no favorable outcome to protect. *Evitts v. Lucey*, 469 U.S. 387 (1985) unquestionably would guarantee the future effective assistance of counsel that initially was denied. *Ford v. Wainwright*, 477 U.S. 399 (1986) guarantees notice and effective participation in future competency proceeding, and unquestionably protects the defendant's legitimate expectation in the enforcement of a favorable outcome. Thus, *Ford* guarantees that an individual adjudicated to be incompetent will not be executed while incompetent. Similarly, a person who received favorable consideration in Ohio's clemency proceedings, *Ohio Adult Parole Authority v. Woodward*, 477 U.S. 272 (1998), would have a protected interest in the enforcement and finality of any grant of clemency.

Pennsylvania created a constitutionally protected life and liberty interest in the finality of the life judgment statutorily mandated as a result of a lifelocked jury. That right vested when the court found the jury deadlocked and imposed a mandatory life sentence. Subjecting Petitioner

to a capital resentencing once that right has vested violated due process.

Respectfully submitted,

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In the Supreme Court of the United States

DAVID ALLEN SATTAZAHN, PETITIONER

v.

COMMONWEALTH OF PENNSYLVANIA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

CAPITAL CASE

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTIONS PRESENTED

1. Whether the Double Jeopardy Clause precludes imposing a sentence of death in a retrial, when, in the initial trial, a sentence of life imprisonment was imposed as a matter of law after the capital sentencing jury deadlocked and was unable to reach a verdict.

2. Whether the Due Process Clause prohibits imposing a sentence of death on a defendant who, after being sentenced to life imprisonment as a matter of law following the sentencing jury's inability to reach a verdict, obtained reversal of his conviction on appeal and is convicted again of capital murder in a retrial.

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INTEREST OF THE UNITED STATES

This case presents the questions whether the Double Jeopardy Clause or the Due Process Clause precludes the imposition of a capital sentence when, in an initial trial, the capital sentencing jury is unable to reach a verdict on the appropriate sentence, the judge imposes a life sentence as a matter of law, and the defendant obtains reversal of his underlying conviction on appeal and is convicted again on retrial. The federal statutes governing administration of the death sentence are similar in relevant respects to the Pennsylvania statute at issue in this case in requiring the trial court to enter a non-capital sentence when the jury is unable to reach a unanimous verdict on the appropriate sentence. See 18 U.S.C. 3593(e), 3594; 21 U.S.C. 848(k)-(*l*). Because both questions presented in this case could arise

under the federal provisions for capital sentencing, the United States has a significant interest in the Court's disposition of this case.

CONSTITUTIONAL PROVISIONS INVOLVED

The Double Jeopardy Clause of the Fifth Amendment of the United States Constitution provides: "No person shall * * * be subject for the same offence to be twice put in jeopardy of life or limb."

The Due Process Clause of the Fourteenth Amendment of the United States Constitution provides: "No State shall * * * deprive any person of life, liberty, or property, without due process of law."

STATEMENT

1. On April 12, 1987, petitioner and an accomplice, Jeffrey Hammer, set out to rob Richard Boyer, who was the manager of a local family restaurant. They chose that date because it fell on a Sunday, and, based on their observations, the restaurant appeared to conduct the most business on Sundays. Petitioner was carrying a .22 caliber pistol, and Hammer was carrying a .41 caliber revolver. They hid in a wooded area behind the restaurant until it closed. When Boyer emerged from the restaurant, they confronted him in the parking lot. With their guns drawn, they attempted to rob him of the bank deposit bag that contained the restaurant's receipts for the day. Instead of handing over the deposit bag, Boyer threw it towards the restaurant and then again towards the roof. Petitioner told Boyer to retrieve the bag, but Boyer refused and attempted to run away. Petitioner and Hammer fired their guns, killing Boyer. They then grabbed the bank deposit bag and fled. J.A. 91-92.

An autopsy revealed that Boyer had suffered two gunshot wounds in the lower back, and one each in the left shoulder, lower face, and back of the head, all of which were consistent with wounds caused by a .22 caliber bullet. Petitioner's gun

was identified as the one that had fired the slugs recovered from Boyer's body and the cartridges found at the scene. J.A. 94-95.

2. a. Before trial, the Commonwealth filed a notice of its intention to seek a sentence of death against petitioner. Br. in Opp. 2. On May 10, 1991, a jury found petitioner guilty of first, second, and third degree murder, two counts of aggravated assault, possession of an instrument of crime, carrying a firearm without a license, and criminal conspiracy. The case then proceeded to the penalty phase. J.A. 92.

The Commonwealth presented one aggravating circumstance—that petitioner committed the killing while perpetrating a felony. See 42 Pa. Cons. Stat. Ann. § 9711(d)(6) (West 1998). Petitioner offered as mitigating circumstances his lack of a significant history of criminal conduct and his age at the time of the crime. J.A. 92. The court instructed the jury in accordance with Pennsylvania law that, before imposing a sentence of death, it was required unanimously to find the existence of at least one aggravating circumstance beyond a reasonable doubt, and also to find either that there were no mitigating circumstances or that any mitigating circumstances failed to outweigh the aggravating circumstances. J.A. 16-17. The court informed the jury that its verdict "is not merely a recommendation," but "actually fixes the punishment at death or life imprisonment." J.A. 19. The court emphasized to the jury that its "verdict, whether it be death or life imprisonment, must be unanimous; it must be the verdict of each and every one of you." J.A. 19-20. The jury also was informed that, if it were "unable to agree on a verdict" and were "hopelessly deadlocked," the court would be required to sentence petitioner to life imprisonment. J.A. 18.[1]

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[1] See 42 Pa. Cons. Stat. Ann. § 9711(c)(1)(v) (West 1998) ("the court may, in its discretion, discharge the jury if it is of the opinion that further

After deliberating for three and one-half hours, the jury informed the court that it was deadlocked. Petitioner moved immediately for discharge of the jury and entry of a sentence of life imprisonment. The court refused to discharge the jury until it had an opportunity to examine whether additional deliberations would be productive. The jurors, in response to the court's questions, indicated that further deliberations would not result in a unanimous verdict. The court then discharged the jury, finding that the jury was "unable to find unanimously for either sentence of death or life imprisonment." The court added that, because of the jury's failure to reach a verdict, the court would sentence petitioner to life imprisonment at the time of formal sentencing. J.A. 22-24.

b. Petitioner appealed his convictions to the Pennsylvania Superior Court. On July 30, 1993, the Superior Court dismissed his convictions for criminal conspiracy and aggravated assault based on insufficiency of the evidence, and remanded for a new trial on the remaining charges because of an instructional error. J.A. 92-93; Br. in Opp. 3-4. While his appeal was pending in the Superior Court, petitioner pleaded guilty in various Pennsylvania jurisdictions to a number of unrelated offenses, including third degree murder, several burglaries, and robbery. J.A. 93 n.2.

3. a. On March 9, 1995, in preparation for petitioner's retrial, the Commonwealth again filed notice of its intention to seek the death penalty. This time, the Commonwealth relied not only on the sole aggravating circumstance it had presented in the initial trial, that petitioner committed the killing while perpetrating a felony, 42 Pa. Cons. Stat. Ann. § 9711(d)(6) (West 1998), but also on a new aggravating circumstance arising from petitioner's intervening convictions:

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deliberation will not result in a unanimous agreement as to the sentence, in which case the court shall sentence the defendant to life imprisonment").

that petitioner had a significant history of felony convictions involving the use of violence, § 9711(d)(9). Petitioner moved to prevent the Commonwealth from seeking the death penalty, but his motion was denied. J.A. 93.

On January 22, 1999, a jury found petitioner guilty of first degree murder. In the penalty phase, the jury sentenced petitioner to death by a unanimous verdict. J.A. 86, 91.

b. The Pennsylvania Superior Court affirmed. J.A. 73-81. The court rejected petitioner's contention under the Double Jeopardy Clause that his sentence of life imprisonment in his initial trial precluded imposition of a sentence of death on retrial. The court explained that the Supreme Court of Pennsylvania, in *Commonwealth* v. *Martorano*, 634 A.2d 1063 (1993), had held that a life sentence imposed by operation of law following a jury deadlock, in contrast to a life sentence imposed by a unanimous jury verdict, raises no double jeopardy bar. J.A. 76-77. The court also rejected petitioner's argument that exposing him to a sentence of death on retrial infringed his state law right of appeal. J.A. 77-78.

c. The Supreme Court of Pennsylvania affirmed. *Commonwealth* v. *Sattazahn*, 763 A.2d 359 (2000), *reprinted in* J.A. 91-109. The court first addressed petitioner's claim under the Double Jeopardy Clause. The court acknowledged that, under this Court's decision in *Bullington* v. *Missouri*, 451 U.S. 430 (1981), a capital sentencing jury's verdict of life imprisonment amounts to an "acquittal" of the death penalty, thus raising a double jeopardy bar against imposing the death sentence if the defendant obtains a retrial. But the court adhered to its decision in *Martorano*, *supra*, which distinguished between a jury verdict of life imprisonment, as was involved in *Bullington*, and a default sentence of life imprisonment imposed in the event of a jury deadlock, as was involved in this case. The latter situation does not involve an "acquittal" of the death sentence, the court ex-

plained, because the jury makes no finding "regarding an appropriate penalty" or "the existence of any aggravating or mitigating circumstances." J.A. 103 (quoting *Martorano*, 634 A.2d at 1070). The court added that, while a hung jury results in the trial court's imposing a life sentence by operation of law, the trial court's action is not an acquittal because the "judge makes no findings and resolves no factual matter." *Ibid.* (quoting *Martorano*, 634 A.2d at 1070).

Next, the court rejected petitioner's contention that permitting the Commonwealth to seek a sentence of death on retrial infringed his state law right of appeal. The court noted that "Pennsylvania's constitutional analysis of these issues is the same as the federal approach." J.A. 105. The court explained that this Court, in *Chaffin* v. *Stynchcombe*, 412 U.S. 17 (1973), had "rejected the claim that a harsher sentence on retrial has a chilling effect on the defendant's right to appeal * * * his conviction." J.A. 106.[2]

SUMMARY OF ARGUMENT

I. The imposition of a sentence of death against petitioner after his retrial did not violate the Double Jeopardy Clause. The power to retry a defendant who has obtained reversal of his initial conviction generally embraces the authority to resentence him if he is re-convicted. That is because the defendant, by gaining a reversal of his conviction, has "wiped the slate clean" and is subject to any sentence authorized for his offense if he is again convicted on retrial. See *North Carolina* v. *Pearce*, 395 U.S. 711, 719-721 (1969). This Court established that principle in *Stroud* v.

[2] The dissent disagreed with the majority only on petitioner's claim that his state law right of appeal had been infringed, and its disagreement was only as a matter of state law. The dissent, concerned about a chilling effect on the right of appeal, believed that the court in its "supervisory role respecting the administration of capital cases in Pennsylvania" should have barred the imposition of a sentence of death on retrial. J.A. 108.

United States, 251 U.S. 15 (1919), which upheld the imposition of a sentence of death in the retrial of a defendant who had been sentenced to life imprisonment in his initial trial.

The "clean slate" rule established in *Stroud*, rather than the narrow exception recognized in *Bullington* v. *Missouri*, 451 U.S. 430 (1981), governs here. In *Bullington*, the jury in effect "acquitted" the defendant of the death sentence by reaching a unanimous verdict for life imprisonment, rather than death, based on the facts of his offense. That trial-like "acquittal" barred the imposition of the death sentence on retrial. Petitioner's life sentence cannot be analogized to an "acquittal," because neither the jury nor the trial court determined that the circumstances of his offense fail to warrant a sentence of death. The jury, unlike the one in *Bullington*, was unable to reach a unanimous verdict. And the trial court's mandatory imposition of a life sentence by operation of law involved no examination of the facts or the evidence.

Although a jury deadlock results in the same outcome under state law as a unanimous jury "acquittal"—the imposition of a life sentence—that is not significant under the Double Jeopardy Clause. The imposition of a life sentence rather than a sentence of death is not, without more, an "acquittal" of the death penalty for double jeopardy purposes. An "acquittal" requires a factual determination that the evidence fails to justify a sentence of death, and no such determination was made in this case. Nor is it significant that Pennsylvania, when there is a hung jury, has elected to impose a life sentence instead of impaneling a new jury and conducting a new sentencing hearing. Pennsylvania need not exercise its constitutional authority to convene another sentencing jury after a jury deadlock in order to preserve its authority to resentence in the event of a retrial and reconviction. This Court's decisions make clear, moreover,

that a unanimous jury verdict is distinct from a jury deadlock, even if both result in a life sentence. See *Lowenfield* v. *Phelps*, 484 U.S. 231, 238 (1988).

II. The Due Process Clause imposes no independent prohibition against sentencing petitioner to death on retrial. Petitioner contends that the life sentence imposed in his initial trial created a permanent entitlement under the Due Process Clause to avoid resentencing for the offense, even after reversal of the conviction on appeal and re-conviction in a new trial. That is incorrect.

Pennsylvania law creates no such entitlement. The relevant capital sentencing statutes prescribe the conduct of a new sentencing hearing after every capital conviction, whether in an initial trial or a retrial. The Due Process Clause does not prevent Pennsylvania from resentencing in a retrial. This Court has held that the imposition of a more severe sentence on retrial after a successful appeal does not violate the Due Process Clause. The lone exception to that rule, which forbids increasing the sentence on retrial as a penalty for the defendant's appeal of his initial conviction, has no application here. The Court held in *Chaffin* v. *Stynchcombe*, 412 U.S. 17 (1973), that concerns about vindictiveness do not arise when sentencing on retrial is conducted by a jury, especially because the jury—as was the case here—often will have no knowledge of the prior sentence.

Far from implicating concerns about vindictiveness, Pennsylvania's decision to permit a new capital sentencing hearing after a re-conviction, but not after an initial hung jury, is a rational choice. First, Pennsylvania may reasonably decide that the State should not bear the burden of empaneling a new jury and retrying the sentencing phase unless a successful appeal makes it necessary to retry the entire case. Second, Pennsylvania may reasonably conclude that a new sentencing jury should have the opportunity to consider all available sentencing options based on any

intervening information that has come to light since the initial trial. Those rationales satisfy the Due Process Clause.

ARGUMENT

I. THE IMPOSITION OF A SENTENCE OF LIFE IMPRISONMENT AS A MATTER OF LAW WHEN THE JURY IN A CAPITAL CASE IS UNABLE TO REACH A SENTENCING VERDICT DOES NOT CONSTITUTE AN "ACQUITTAL" OF THE DEATH PENALTY FOR DOUBLE JEOPARDY PURPOSES

Under the Double Jeopardy Clause, an acquittal of a substantive criminal charge finally disposes of the case and bars retrial. See, *e.g.*, *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 571 (1972). Because the Double Jeopardy Clause historically has not been applied to sentencing decisions, however, the imposition of a particular sentence generally is not considered an "acquittal" of a greater sentence. See *Monge* v. *California*, 524 U.S. 721, 728-729 (1998); *United States* v. *DiFrancesco*, 449 U.S. 117, 129-130 (1980). The Court recognized a narrow exception to that principle in *Bullington* v. *Missouri*, 451 U.S. 430 (1981). *Bullington* holds that, if the jury in the penalty phase of a bifurcated capital trial in effect "acquits" the defendant of a death sentence by choosing to sentence him to life imprisonment, the defendant cannot, if he obtains reversal of his conviction, be sentenced to death in a retrial.

The issue in this case is whether the *Bullington* exception applies when a capital defendant is sentenced to life imprisonment, not, as in *Bullington*, by a unanimous jury verdict, but instead by operation of law when the jury is unable to reach agreement on the appropriate sentence. In the absence of a factual determination, based on the particular circumstances of the case, that a sentence of death is not warranted for the offense, there is no "acquittal" under

Bullington. Because neither the jury nor the trial court made that determination in this case, petitioner's double jeopardy claim should be rejected.

A. The Double Jeopardy Clause Generally Imposes No Limits On The Sentence That May Be Imposed In The Retrial Of A Defendant Who Obtains Reversal Of His Initial Conviction

"Historically," this Court has "found double jeopardy protections inapplicable to sentencing proceedings, because the determinations at issue do not place a defendant in jeopardy for an 'offense.'" *Monge*, 524 U.S. at 728 (citations omitted). As is especially relevant here, the "imposition of a particular sentence usually is not regarded as an 'acquittal' of any more severe sentence that could have been imposed." *Bullington*, 451 U.S. at 438; see *Monge*, 524 U.S. at 729; *DiFrancesco*, 449 U.S. at 134.

For that reason, a defendant who is retried after obtaining reversal of his conviction on appeal ordinarily has no double jeopardy claim against the imposition of a more severe sentence if he is again convicted. See *Monge*, 524 U.S. at 729; *DiFrancesco*, 449 U.S. at 134-135; *Pearce*, 395 U.S. at 719-721. Instead, the "corollary of the power to retry a defendant is the power, upon the defendant's reconviction, to impose whatever sentence may be legally authorized, whether or not it is greater than the sentence imposed after the first conviction." *Pearce*, 395 U.S. at 720. The "rationale for this 'well-established part of our constitutional jurisprudence,'" the Court has explained, "rests ultimately upon the premise that the original conviction has, at the defendant's behest, been wholly nullified and the slate wiped clean." *Id.* at 720-721 (quoting *United States* v. *Tateo*, 377 U.S. 463, 465 (1964)). The defendant, after "wiping the slate clean," is subject to any sentence authorized for his offense if he is re-convicted following a new trial. *Id.* at 721.

The Court has traced the "clean slate" principle to *Stroud* v. *United States*, 251 U.S. 15 (1919), see *Chaffin* v. *Stynchcombe*, 412 U.S. 17, 23-24 (1973); *Pearce*, 395 U.S. at 720, and *Stroud* is significant here because it involved a jury's decision in a capital case to sentence the defendant to life imprisonment rather than death. Stroud was found guilty by a jury of first degree murder. The punishment for that offense was set by statute as death, except that the jury could, as it did in Stroud's initial trial, specify in its verdict that the defendant should be sentenced to life imprisonment. *Stroud*, 251 U.S. at 17-18; see *Bullington*, 451 U.S. at 439 n.11. Stroud obtained a reversal of his conviction on appeal, but he was again convicted of first degree murder after a new trial, this time with no specification in the jury's verdict that the sentence of death should not be imposed. 251 U.S. at 18. This Court held unanimously "that the Double Jeopardy Clause * * * did not bar the imposition of the death penalty when Stroud at his new trial was again convicted." *Bullington*, 451 U.S. at 432.[3]

Although changes in this Court's capital jurisprudence have limited *Stroud*'s application, the Court repeatedly has reaffirmed *Stroud*'s general understanding of the Double Jeopardy Clause. See *Monge*, 524 U.S. at 730, 733; *Schiro* v. *Farley*, 510 U.S. 222, 230 (1994); *Bullington*, 451 U.S. at 431-432, 438-439; *Chaffin*, 412 U.S. at 23-24; *Pearce*, 395 U.S. at 720. *Stroud* establishes that the imposition of a life sentence raises no double jeopardy bar against imposing a sentence of death upon a re-conviction, unless, as *Bullington* later held, the life sentence can be analogized to an "acquittal."

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[3] In *Stroud*, the jury was given no substantive standards or guidance by which to determine the appropriate sentence, and was required to find no additional facts in order to sentence the defendant to death. See *Bullington*, 451 U.S. at 439 n.11, 441 n.15; see also *Monge*, 524 U.S. at 733.

B. *Bullington* Bars A Sentence Of Death On Retrial Only If The Defendant Was "Acquitted On The Merits" Of The Death Penalty In His Initial Trial

In *Bullington*, the Court accepted the "clean slate" rule established in *Stroud* and later decisions, under which the Double Jeopardy Clause generally imposes no constraints on the sentence imposed in a retrial. *Bullington*, 451 U.S. at 442. The Court also accepted the specific conclusion in *Stroud* that the jury's decision in favor of a sentence of life imprisonment in Stroud's initial trial did not preclude imposing a sentence of death in his retrial. See *id.* at 431-432. The question in *Bullington* was whether the same conclusion should obtain when the jury's decision to impose a life sentence is made in a separate penalty proceeding in which—as in many capital sentencing statutes enacted after *Furman* v. *Georgia*, 408 U.S. 238 (1972)—the jury is given a choice between two specific sentencing verdicts, the jury's decision is guided by substantive standards, and the prosecution is required to prove the existence of additional facts beyond a reasonable doubt. See *Bullington*, 451 U.S. at 432, 436-437, 446.

In those circumstances, the Court held, the jury's verdict in favor of a life sentence raises a double jeopardy bar against imposing a sentence of death on retrial. The Court reasoned that, although reversal of a conviction normally wipes the slate clean, reversal on the ground that the evidence was insufficient to convict is treated as an acquittal and prohibits further proceedings. See *Bullington*, 451 U.S. at 442-443 (citing *Burks* v. *United States*, 437 U.S. 1 (1978)). The same exception, the Court concluded, should apply to the unanimous jury verdict in *Bullington* for a life sentence. Because that verdict resulted from "a capital sentencing procedure that resembles a trial on the issue of guilt or innocence," the jury effectively had "acquitted the defendant

of whatever was necessary to impose the death sentence." *Id.* at 444-445 (citation omitted). Accordingly, the "protection afforded by the Double Jeopardy Clause to one acquitted by a jury also is available to him, with respect to the death penalty, at his retrial." *Id.* at 446. The Court held that, when a sentence of life imprisonment amounts to a trial-like "acquittal" of the death penalty, the clean slate rule would not apply. *Ibid.*[4]

Later decisions make clear that "*Bullington* established a 'narrow exception,'" *Monge*, 524 U.S. at 730, which arises only when the imposition of a life sentence amounts to an "acquittal on the merits" on whether a sentence of death is appropriate for the offense. In *Arizona* v. *Rumsey*, 467 U.S. 203 (1984), the trial judge, who under Arizona law is the sentencer in a capital case, entered a sentence of life imprisonment on finding that the State had failed to establish the existence of any aggravating circumstances. This Court explained that the "double jeopardy principle" that governed was "the same as that invoked in *Bullington*: an *acquittal on the merits* by the sole decisionmaker in the proceeding is final and bars retrial on the same charge." *Id.* at 211 (emphasis added). The trial court's decision in *Rumsey* to impose a sentence of life imprisonment "was undoubtedly an acquittal on the merits" on "whether death was the appropriate punishment," because it was based on findings of fact denying the existence of any aggravating circumstances. *Ibid.* "That judgment, based on findings sufficient to establish legal entitlement to the life sentence," prohibited a "retrial of the appropriateness of the death penalty." *Ibid.*

In *Poland* v. *Arizona*, 476 U.S. 147 (1986), the Court again stressed that *Bullington* requires an acquittal on the merits

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[4] The Court subsequently held in *Monge* v. *California*, 524 U.S. at 730-734, that *Bullington*'s exception to the clean slate rule does not extend beyond the capital sentencing context.

of the death penalty. There, the trial judge sentenced the defendant to death based on one aggravating circumstance. The Arizona Supreme Court found the evidence insufficient to support that aggravating circumstance, but ordered a new sentencing hearing on remand because the trial judge had erred in his interpretation of a different aggravating circumstance. See *id.* at 149-150. This Court held that *Bullington* did not bar a new sentencing hearing on remand, because neither the trial judge nor the reviewing court had "acquitted" the defendant of the death penalty. The trial judge had imposed the death penalty, and the reviewing court had held that it might be warranted based on a different aggravating circumstance. *Id.* at 154. Although the reviewing court had found the evidence insufficient to support the particular aggravating circumstance relied on by the trial judge, *Bullington*, the Court explained, requires an acquittal on whether "*the death penalty is appropriate.*" *Id.* at 155. A contrary understanding "would push the analogy on which *Bullington* is based past the breaking point." *Id.* at 156. In the case before it, no court had found "the evidence * * * legally insufficient to justify imposition of the death penalty," and there was no "acquittal." *Id.* at 157.[5]

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[5] Both *Poland* and *Rumsey* involved Arizona's capital sentencing procedures, under which the trial judge determines the appropriate sentence. This Court's decision last Term in *Ring* v. *Arizona*, 122 S. Ct. 2428 (2002), invalidates the Arizona scheme insofar as it allows the trial judge rather than a jury to determine the existence of aggravating factors required by Arizona law for imposition of the death penalty. The Court found that aspect of the Arizona scheme to be inconsistent with *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), because it deprives a defendant of his right under the Sixth Amendment to a jury determination of facts that increase the maximum sentence authorized by law. *Ring* holds only that the Sixth Amendment requires a jury to determine the existence of aggravating factors necessary to impose the death penalty, not that the jury must also determine ultimately whether a sentence of death should be imposed. See *Ring*, 122 S. Ct. at 2437 n.4. In any event, *Ring* has no bearing on the conclusion in *Rumsey* and *Poland* that the *Bullington* exception applies only when the decision to impose a sentence of life imprisonment—whether made by a judge or a jury—constitutes an acquittal on the merits on the question whether death is an appropriate sentence for the offense.

C. The Life Sentence Imposed In Petitioner's Initial Trial Was Not An Acquittal On The Merits Of The Death Penalty

The life sentence imposed by the trial court in petitioner's initial trial did not constitute an "acquittal" on whether a sentence of death is appropriate for his offense. The Double Jeopardy Clause therefore does not bar the imposition a sentence of death when petitioner, after obtaining reversal of his conviction on appeal, was again convicted in a retrial.

1. *Neither the jury nor the trial court made a factual determination that a sentence of death is not warranted for petitioner's offense*

An "acquittal" on guilt or innocence entails a decision by the jury or the trial court that the facts in evidence fail to establish the elements of the charged offense. See, *e.g.*, *Sanabria* v. *United States*, 437 U.S. 54, 71 (1978); *United States* v. *Scott*, 437 U.S. 82, 97 (1978); *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977). By analogy, a "death penalty 'acquittal'" requires the sentencer to render a verdict that the death penalty is not an appropriate punishment, *Rumsey*, 467 U.S. at 209-210; *Bullington*, *supra*, or a court to "find [that] the evidence [is] legally insufficient to justify imposition of the death penalty," *Poland*, 476 U.S. at 157. The jury took no such action in petitioner's initial trial, as it was unable to reach a verdict on a sentence. The trial court likewise made no such determination, as its imposition of a life sentence was non-discretionary and involved no examination of the evidence. Because

petitioner's life sentence was not the result of an "acquittal," it, like most sentencing determinations, raised no double jeopardy bar against resentencing him after a new trial.

a. The jury in petitioner's first capital sentencing hearing was discharged after it was unable to reach a unanimous verdict on the appropriate sentence for his offense. Because the jury failed to reach any verdict at all, it follows necessarily that the jury did not render an acquittal.

This Court's decisions are clear on the point. "A deadlocked jury," the Court "consistently ha[s] recognized, does not result in an acquittal barring retrial under the Double Jeopardy Clause." *Tibbs* v. *Florida*, 457 U.S. 31, 42 (1982). The failure of the jury to reach agreement therefore raised no double jeopardy prohibition against conducting a new capital sentencing proceeding after petitioner was again convicted. See *ibid.*; *Richardson* v. *United States*, 468 U.S. 317, 324 (1984) ("[W]e have constantly adhered to the rule that a retrial following a 'hung jury' does not violate the Double Jeopardy Clause."); *Arizona* v. *Washington*, 434 U.S. 497, 509-510 (1978); *United States* v. *Sanford*, 429 U.S. 14 (1976) (per curiam); *United States* v. *Perez*, 22 U.S. (9 Wheat.) 579 (1824).

b. In Pennsylvania, as in most jurisdictions, the inability of a capital sentencing jury to reach agreement on the appropriate sentence results in discharge of the jury and imposition of a non-capital sentence by the trial court. See 42 Pa. Cons. Stat. Ann. § 9711(c)(1)(v) (West 1998); *Jones* v. *United States*, 527 U.S. 373, 419 (1999) (Ginsburg, J., dissenting) (observing that "most States require judge sentencing once a jury has deadlocked" in a "capital penalty-phase proceeding[]"). The trial court's imposition of a life sentence by operation of law in those circumstances, as occurred in petitioner's first trial, is not an acquittal.

A "trial court's ruling in favor of the defendant is an acquittal only if it 'actually represents a resolution, correct

or not, of some or all of the factual elements of the offense charged.'" *Lee* v. *United States*, 432 U.S. 23, 30 n.8 (1977). An acquittal of the death penalty ordinarily entails findings of fact establishing either that no aggravating circumstances exist or that mitigating circumstances exist and outweigh any aggravating circumstances. See *Rumsey*, 467 U.S. at 211 (holding that trial judge's "findings denying the existence of each of the seven statutory aggravating circumstances" was an "acquittal on the merits"). The trial court's imposition of a life sentence in petitioner's first trial, however, resolved no "factual elements" in his favor, *Lee*, 432 U.S. at 30 n.8, and involved no assessment of the evidence or of the existence of aggravating and mitigating circumstances. Instead, the trial court was compelled by operation of law to impose a sentence of life imprisonment, with no discretion in the matter, and without regard to the facts.

This Court's decision in *United States* v. *Martin Linen Supply Co.*, *supra* (see Pet. Br. 25), has no application here. In that case, the jury was deadlocked on whether to convict the defendant, and the trial court, after discharging the jury, granted the defendant's motion for a judgment of acquittal. The Court found that the Double Jeopardy Clause barred further proceedings: the trial court's judgment, because it was based on an "evaluat[ion] [of] the Government's evidence and [a] determin[ation] that it was legally insufficient to sustain a conviction," was an acquittal "in substance as well as form." 430 U.S. at 572. Although here, as in *Martin Linen Supply Co.*, the trial court entered judgment after discharging a deadlocked jury, its judgment was not based on an "evaluation of the evidence" or a "determination that it was legally insufficient" to support a sentence of death. The trial court in fact had no occasion to examine the evidence or to weigh its sufficiency. Its imposition of a life sentence by

operation of law therefore cannot be analogized to a judgment of acquittal.[6]

2. ***That a jury deadlock results in the imposition of a life sentence does not render it an acquittal for purposes of the Double Jeopardy Clause***

Petitioner emphasizes (Pet. Br. 24-26) that, whereas a hung jury on the question of guilt or innocence gives rise to a new trial, a hung jury in a capital sentencing proceeding results in the trial court's imposition of a sentence of life imprisonment. The trial court's entry of a life sentence is a judgment of acquittal, petitioner reasons, because it ends the proceedings in favor of the defendant with the same outcome as a unanimous jury verdict for life. The absence of any factual determination, petitioner contends (*id.* at 26-27), is irrelevant. That argument is without merit.

a. Petitioner assumes that, because the imposition of a life sentence when the jury deadlocks produces the same outcome as a jury "acquittal," the trial court enters a judgment of acquittal when it imposes a life sentence following a hung jury. That a jury deadlock and a jury acquittal both result in the imposition of a life sentence, however, is not significant under the Double Jeopardy Clause. As *Stroud* v. *United States*, *supra*, makes clear, a factual resolution based on a trial-type proceeding is necessary to have an "acquittal" of a greater sentence. Although the jury in Stroud's initial trial elected to impose a sentence of life imprisonment rather than death, and the trial court entered judgment accordingly, the fact that Stroud was sentenced to life imprisonment did not, of its own force, raise a double

[6] Petitioner's reliance on *Smalis* v. *Pennsylvania*, 476 U.S. 140 (1986), see Pet. Br. 26 n.10, is misplaced for the same reasons. In *Smalis*, as in *Martin Linen Supply Co.*, the trial court determined that the evidence was "insufficient to establish [the defendant's] factual guilt." 476 U.S. at 144. Here, the trial court made no factual determination.

jeopardy bar against imposing a sentence of death after his retrial. Instead, Stroud's life sentence carried no double jeopardy consequences because it did not amount to a trial-like "acquittal." *Bullington*, 451 U.S. at 431-432, 439, 446.

Similarly, the imposition of a life sentence on the completion of a sentencing hearing is not, without more, an "acquittal" of the death sentence. See Pet. Br. 29. Instead, an acquittal requires an examination of the evidence and a factual determination that the offense fails to justify the death penalty, see *Poland*, 476 U.S. at 157; *Bullington*, *supra*, and that determination must be made in a trial-type setting, see *Stroud*, *supra*. Here, neither the jury nor the trial court made any factual determination as to the appropriate sentence, and the trial judge's action was a result of a state law rather than a trial-type proceeding. As a result, petitioner's life sentence, like the life sentence in *Stroud*, is subject to the general "clean slate" rule for sentencing determinations. His "legal entitlement" to a life sentence (Pet. Br. 24, 27) came to an end when he obtained reversal of the underlying conviction.

Petitioner's life sentence has the same status under the Double Jeopardy Clause as a life sentence that results when the government, in exchange for a guilty plea, elects to forgo seeking a sentence of death. See *Osborn* v. *Shillinger*, 997 F.2d 1324, 1327-1328 (10th Cir. 1993) (upholding sentence of death on retrial following successful habeas challenge to guilty plea); *State* v. *Hinchey*, 890 P.2d 602, 605-608 (Ariz. 1995) (upholding sentence of death on retrial following post-conviction relief from guilty plea), cert. denied, 516 U.S. 993 (1995) In both situations, the life sentence does not fall within the *Bullington* exception because it does not result from a determination by the sentencer that the evidence fails to justify a sentence of death. See *Osborn*, 997 F.3d at 1327-1328; *Hinchey*, 890 P.2d at 605-608. In both situations, therefore, the defendant has no continuing entitlement to a life

sentence if he obtains reversal of his conviction and is re-convicted.

b. Petitioner also errs in comparing the consequences of a hung jury at trial and at sentencing (Pet. Br. 24-26), and in attaching significance to Pennsylvania's decision to impose a life sentence when the jury deadlocks rather than to convene a new sentencing jury for a new sentencing proceeding. A State's election to conduct only a single capital sentencing proceeding before imposing a default life sentence after a hung jury does not transform the life sentence into an acquittal under *Bullington*.

As discussed, there is no double jeopardy prohibition against conducting a new capital sentencing hearing when the jury deadlocks. Any decision not to do so represents a state policy choice, not a requirement of the Constitution.[7] It follows that there can be no double jeopardy violation when a State elects to hold a new sentencing hearing if the defendant obtains a retrial and is re-convicted. That is precisely what Pennsylvania has done here. Any suggestion that Pennsylvania is barred by the Double Jeopardy Clause from making that choice—and is required to attempt to impose the death sentence at every available opportunity—would imply that Pennsylvania must disadvantage all defendants whose sentencing hearing ends in deadlock in order to preserve the right to conduct a full sentencing hearing if a particular defendant overturns his conviction and thus again faces trial. There is no merit to such an approach. See

[7] In *Jones* v. *United States*, 527 U.S. 373 (1999), this Court decided, as a matter of statutory interpretation, that the Federal Death Penalty Act does not authorize the government to impanel a new jury when a federal capital sentencing jury fails to reach a unanimous verdict. See *id.* at 380-381; see also *id.* at 417-420 (Ginsburg, J., dissenting). There was no suggestion in *Jones*, however, in either the majority or dissenting opinions, that Congress could not provide that authority consistent with the Double Jeopardy Clause.

Monge, 524 U.S. at 734 (declining to "extend the double jeopardy bar" of *Bullington* to *non*capital sentencing proceedings with trial-like protections for defendants because doing so would create disincentives for States to maintain trial-like protections as a matter of legislative grace).

3. *The presence of one or more jurors who would vote to impose a life sentence does not result in a death penalty acquittal*

Insofar as petitioner accepts that an "acquittal" in a capital sentencing proceeding requires a factual determination that the evidence does not justify a sentence of death, he asserts (Pet. Br. 24, 27, 32-33) that the failure of all twelve jurors to agree on a sentence of death amounted to a determination that death is not an appropriate punishment. That contention, the upshot of which is that one juror could render an acquittal, is without basis.

a. The settled rule that a hung jury does not result in an acquittal forecloses petitioner's suggestion that the failure of all twelve jurors to agree amounted to a decision that a sentence of death is unwarranted. It is true (Pet. Br. 24, 27) that the Commonwealth bore the burden of convincing the jury to agree unanimously on a sentence of death. That is also true of the underlying question of guilt or innocence, however, and it is well settled that a trial that results in a divided jury has not produced an acquittal. *E.g.*, *Tibbs*, 457 U.S. at 42. Any conclusion that a capital sentencing proceeding is different—in that one juror's vote for a life sentence results in an acquittal of the death penalty—would "push the analogy on which *Bullington* is based past the breaking point." *Poland*, 476 U.S. at 156.

In any event, Pennsylvania law, in accordance with federal law and the capital sentencing laws of most States with jury sentencing, makes clear that the jury must be unanimous *either* to impose a sentence of death *or* to impose

a sentence of life imprisonment. See *Commonwealth* v. *Jones*, 683 A.2d 1181, 1199 (Pa. 1996) (rejecting as "nonsensical" the argument "that the jury could impose a life sentence in the absence of a unanimous agreement").[8] The jury in this case was instructed accordingly. J.A. 19-20. Its inability to arrive at a unanimous verdict, either for a life sentence or for a sentence of death, thus cannot be characterized as an acquittal. See *Arizona* v. *Washington*, 434 U.S. at 509 ("The argument that a jury's inability to agree establishes reasonable doubt as to the defendant's guilt, and therefore requires acquittal, has been uniformly rejected in this country."). No contrary conclusion is suggested by the fact that, as a result of the jury's deadlock, the trial court was required by operation of law to impose a life sentence. See pp. 16-21, *supra*.[9]

b. The suggestion that one juror could render an acquittal of the death sentence also cannot be squared with this Court's explanation of the role of a capital sentencing jury in parallel statutory schemes. In *Lowenfield* v. *Phelps*, 484

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[8] Under Utah law, although the jury must be unanimous to impose a sentence of death, a majority of ten jurors can impose a sentence of life imprisonment without parole. See Utah Code Ann. § 76-3-207(4)(c) (1999); cf. *Apodaca* v. *Oregon*, 406 U.S. 404 (1972) (unanimous verdict not required in a state criminal case). But the jury in this case was not authorized to render any nonunanimous verdict. See *Commonwealth* v. *Jones*, 683 A.2d at 1199 ("The jury's verdict in the penalty phase of a first degree murder case, whether it be a sentence of life or death, must, just as is true of any verdict in a criminal case, be unanimous.").

[9] Petitioner errs in relying (Pet. Br. 32) on *Schiro* v. *Farley*, 510 U.S. 222 (1994). *Schiro* describes *Bullington* as a "narrow exception" to the clean slate rule, which arises when "requiring a defendant to submit to a second, identical [sentencing] proceeding [is] tantamount to permitting a second prosecution of an *acquitted* defendant." *Id.* at 231 (emphasis added) (citing *Bullington*, 451 U.S. at 446). *Schiro* contains no suggestion that *Bullington* bars a new capital sentencing proceeding on retrial even in the absence of a death penalty "acquittal."

U.S. 231 (1988), the Court upheld against a constitutional challenge the giving of an "*Allen* charge," see *Allen* v. *United States*, 164 U.S. 492 (1896), urging a divided jury in a capital sentencing hearing to reach a unanimous sentencing verdict through further deliberations. The defendant argued that there was no point to achieving unanimity, on the ground that "Louisiana law"—like Pennsylvania law here—"provides that if the jury hangs, the court shall impose a sentence of life imprisonment." *Lowenfield*, 484 U.S. at 238. This Court, however, rejected the suggestion that there was no material difference between a hung jury and a unanimous jury verdict. The Court explained: "The State has in a capital sentencing proceeding a strong interest in having the jury 'express the conscience of the community on the ultimate question of life or death.'" *Ibid.* (quoting *Witherspoon* v. *Illinois*, 391 U.S. 510, 519 (1968)).

Jones v. *United States*, 527 U.S. 373 (1999), is to the same effect. That case involved the Federal Death Penalty Act of 1994, 18 U.S.C. 3591 *et seq.*, which the Court read to require —like the Louisiana law in *Lowenfield* and Pennsylvania's in this case—imposition of a non-capital sentence by the trial court in the event of a jury deadlock. See 527 U.S. at 380-381. The Court rejected the defendant's claim that the jury should have been instructed that its failure to reach a unanimous verdict would result in the imposition of a life sentence. *Id.* at 381-384. That instruction, the Court explained, "has no bearing on the jury's role in the sentencing process." *Id.* at 382. Instead, "it speaks to what happens in the event that the jury is unable to fulfill its role—when deliberations break down and the jury is unable to produce a unanimous sentence recommendation." *Ibid.* In fact, the Court concluded, the requested instruction would tend to undermine the significant interest recognized in *Lowenfield*, *i.e.*, "the strong governmental interest * * * in having the jury render a unanimous sentence recommendation" to

convey the voice of the community on the question of life or death. *Id.* at 383.[10]

By holding, in the context of analogous statutory schemes, that the "jury is unable to fulfill its role" when it "is unable to produce a unanimous sentence recommendation," 527 U.S. at 382, *Jones* and *Lowenfield* rebut the suggestion that one juror's vote for a life sentence amounts to an acquittal. If there were no significance to the distinction between one vote for a life sentence and twelve, there would be little justification for an *Allen* charge. The presence of at least one juror favoring a life sentence would fulfill the jury's function and eliminate the need for further deliberations. Likewise, a defendant could claim entitlement to the instruction denied in *Jones* because the vote of one juror for a life sentence would be relevant to the jury's role. But the Court held that "the proposed instruction has no bearing on

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[10] Although the jury here was instructed that, if the jurors were "hopelessly deadlocked," it would be the judge's "duty to sentence the defendant to life imprisonment," J.A. 18, that instruction did not detract from the court's repeated emphasis on the need for the jury to act unanimously in order to render a verdict, J.A. 15-20. The judge's emphasis on a unanimous jury verdict reflected the State's interest in having the jury, not the judge (by operation of law), determine the appropriate penalty. Cf. *Ring* v. *Arizona*, 122 S. Ct. at 2442 n.6 (including Pennsylvania in list of states that "generally commit [capital] sentencing decisions to juries"). In a decision issued after the initial trial in this case, the Supreme Court of Pennsylvania held that there is no requirement to instruct the jury on the consequences of a deadlock. *Commonwealth* v. *Cross*, 634 A.2d 173, 178 (Pa. 1993), cert. denied, 513 U.S. 833 (1994) (explaining that "[t]his particular section is intended to give guidance to the court in cases where a jury is unable to reach a verdict" and that "a request to have this instruction read" to the jury "would have been denied").

the jury's role," *ibid.*, confirming that there can be no jury acquittal in the absence of a unanimous verdict.[11]

II. THE DUE PROCESS CLAUSE DOES NOT PROHIBIT IMPOSING A SENTENCE OF DEATH AGAINST A DEFENDANT WHO, AFTER BEING SENTENCED TO LIFE IMPRISONMENT, OBTAINS A REVERSAL OF HIS CONVICTION ON APPEAL AND IS AGAIN CONVICTED AFTER A RETRIAL

The Due Process Clause raises no independent prohibition against sentencing petitioner to death after his re-conviction. The core of the "clean slate" rule is that a defendant, after obtaining reversal of his initial conviction on appeal, is subject to an increased sentence if he is again convicted in a retrial. See *Chaffin*, 412 U.S. at 23-35; *Pearce*, 395 U.S. at 720-721. Although the prospect of re-conviction and the

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[11] The jury also did not "implicitly" acquit petitioner. See Pet. Br. 23 (citing *Green* v. *United States*, 355 U.S. 184 (1957)). This Court has found an "implicit acquittal" only when a jury is given the option of convicting on two offenses, one a lesser included offense of the other, and it returns a verdict form convicting on the lesser charge but failing to reflect any decision on the greater charge. See *Price* v. *Georgia*, 398 U.S. 323, 328-329 (1970); *Green*, *supra*. If the jury is released without the defendant's consent, its conviction on the lesser charge is deemed an "implicit acquittal" on the greater charge. See *Green*, 355 U.S. at 190-191. No court has suggested that a hung jury implies an acquittal, however (see p.16, *supra*), and there is no occasion for inferring an acquittal when a jury has made known that it is unable to reach a verdict. See *United States* v. *Bordeaux*, 121 F.3d 1187 (8th Cir. 1997). The nature of the choice facing a capital sentencing jury, in any event, rules out any prospect of an implicit acquittal. This Court requires, as the predicate for implying an acquittal from jury silence, a concurrent conviction on another charge. See *Green*, 355 U.S. at 190 ("When given the choice between finding him guilty of either first or second degree murder it chose the latter."). When a capital sentencing jury is unable to reach a sentencing verdict, however, it fails to make a decision on the only "charge" then before it.

imposition of a more severe sentence might affect the defendant's decision whether to appeal, the "possibility of a higher sentence [is] recognized and accepted as a legitimate concomitant of the retrial process." *Chaffin*, 412 U.S. at 25. Accordingly, the "choice occasioned by the possibility of a harsher sentence, even in the case in which the choice may in fact be 'difficult,' does not place an impermissible burden on the right of a criminal defendant to appeal * * * his conviction." *Id.* at 35; see *Texas* v. *McCullough*, 475 U.S. 134, 143 (1986).

There is one exception to the rule that an increased sentence on retrial is permisible under the Due Process Clause, and it is not applicable here. This Court has "made clear * * * that 'the Due Process Clause is not offended by all possibilities of increased punishment upon retrial after appeal, but only by those that pose a realistic likelihood of vindictiveness.'" *Alabama* v. *Smith*, 490 U.S. 794, 800 n.3 (1989) (quoting *Blackledge* v. *Perry*, 417 U.S. 21 (1974)); see *Chaffin*, 412 U.S. at 29 (observing that the Court has "intimated no doubt about the constitutional validity of higher sentences [in a retrial] in the absence of vindictiveness"). Where, as in this case, resentencing is conducted by a jury, there is no "real threat of vindictiveness." *Id.* at 28. The jury has "no personal stake in the prior conviction and no motivation to engage in self-vindication." *Id.* at 27. In fact, the jury typically, as was the case here, will have no knowledge of the prior conviction or sentence. See *id.* at 26.[12]

Petitioner does not mention or dispute those established principles. Nor does he challenge the Commonwealth's pro-

[12] There could be no merit to an argument that the Commonwealth's decision to seek a sentence of death in petitioner's retrial was the result of vindictiveness. See *Chaffin* 412 U.S. at 27 n.13 ("No such indication [of vindictiveness] exists on this record since the prosecutor vigorously urged the imposition of the death penalty at the first trial.").

cedures for sentencing him to death in his retrial. He instead asserts (Pet. Br. 34-41) that he held a protected entitlement in the life sentence imposed in his initial trial by operation of law, and that the Commonwealth arbitrarily deprived him of that entitlement when it resentenced him after his retrial. That argument is an outright contradiction of the clean slate rule, however, the basic import of which is that a State *can*, consistent with the Due Process Clause, impose any punishment authorized by law in a retrial. Nothing in Pennsylvania law repudiates that basic authority of the State to seek all available sentences if the defendant overturns the initial judgment by taking a successful appeal. See *Commonwealth* v. *Henderson*, 393 A.2d 1146, 1153-1154 (Pa. 1978) (noting that in cases involving "an increase over the original sentence following retrial secured at the defendant's behest, * * * there has been absolutely no suggestion that the Pennsylvania Constitution provides a more comprehensive protection than that afforded by the Federal Constitution"). To the contrary, Pennsylvania's capital sentencing statute prescribes that "the court *shall* conduct a separate sentencing hearing" after "a verdict of murder of the first degree," with no suggestion that the requirement of a hearing is inapplicable in a retrial. 42 Pa. Cons. Stat. Ann. § 9711(a)(1) (West 1998) (emphasis added).

Petitioner asserts (Pet. Br. 38) that he was not advised that his sentence could increase in a retrial. Pennsylvania law, however, gave him no reason to suppose otherwise, and the clean slate rule supplied the relevant background principle. There is no necessity that the State explicitly preserve the option to resentence in order to avail itself of a power it generally possesses under state and federal law.

Pennsylvania's decision to permit resentencing after a reconviction, but not after a hung jury, is not "arbitrary." See Pet. Br. 38 n.17. When a sentencing jury deadlocks, impaneling a second jury and conducting a new sentencing

proceeding would require retrying much of the case on guilt or innocence. The second jury would come to the sentencing proceeding entirely unfamiliar with the facts of the case or the evidence on the underlying question of guilt, information that is essential to assessing the appropriate sentence for the offense. Selection of a new capital sentencing jury also is a difficult and resource-intensive task. A State reasonably could decide in those circumstances to impose a sentence of life imprisonment instead of convening a new jury and conducting a new sentencing hearing.

The considerations are materially different when the defendant overturns his conviction on appeal and the State obtains another conviction in a new trial. In that situation, the State will have selected a capital jury, and that jury will have intimate familiarity with the case from the retrial on guilt or innocence. A State could decide that those circumstances warrant permitting the jury to consider the full range of sentencing options allowed by law.

In addition, if a State were to hold a capital sentencing hearing on the heels of a hung jury, that proceeding likely would not present the jury with new information relevant to the appropriate sentence. By the time of a retrial following an appeal, however, additional information might well come to light that bears on the sentencing decision. See *Pearce*, 395 U.S. at 723 (observing that, after a re-conviction, the sentencer might have new information "from evidence adduced at the second trial itself, from a new presentence investigation, from the defendant's prison record, or possibly from other sources"); cf. *Alabama* v. *Smith*, 490 U.S. 794 (1989) (holding that there is no due process violation in increase of sentence after retrial following defendant's successful appeal to set aside guilty plea because new sentencing information provided at trial justifies the sentence); *Wasman* v. *United States*, 468 U.S. 559, 564 (1984) ("[h]ighly relevant—if not essential—to [the] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics") (quoting *Williams* v. *New York*, 337 U.S. 241, 247 (1949)). That information could provide reason either to seek or to forgo a sentence of death on retrial. This case illustrates the point. Petitioner's sentence of death was based in part on his several intervening convictions for violent felonies. See *id.* at 569-570 ("Consideration of a criminal conviction obtained in the interim between an original sentencing and a sentencing after retrial is manifestly legitimate."); see also *McCullough*, 475 U.S. at 141. For those reasons, Pennsylvania had a rational interest in permitting a new sentencing hearing on retrial, while forgoing one when the initial jury hung.

CONCLUSION

The judgment of the Supreme Court of Pennsylvania should be affirmed.

Respectfully submitted.

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